90-102

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LIBERTY COUNTY, FLORIDA, ET AL,
AND
LIBERTY COUNTY SCHOOL BOARD, ET AL,
Petitioners,

versus

GREGORY SOLOMON, ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS, ELEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THE COURT'S THORNBURG V. GINGLES OPINION BE CLARIFIED, AS APPLIED TO THE INSTANT CASE, CONCERNING THE LEGAL EFFECT OF THE THREE GINGLES THRESHOLD FACTORS?

II. SHOULD THE COURT'S GINGLES OPINION BE CLARIFIED, AS TO HOW SMALL A MINORITY MAY BE ENTITLED TO A REMEDY FOR ALLEGED VOTE DILUTION, IN VIEW OF THE DISCLAIMER OF ANY RIGHT TO PROPORTIONAL REPRESENTATION IN THE VOTING RIGHTS ACT OF 1965?

III. MAY THE COURT OF APPEALS MAKE CONCLUSIVE FACTUAL FINDINGS, AS A MATTER OF LAW, AS TO THE THRESHOLD FACTORS ADOPTED IN GINGLES, IN A CASE WHICH WAS TRIED BEFORE GINGLES WAS DECIDED, WHEN THE EVIDENCE WAS DISPUTED AND WHEN THE TRIAL COURT DID NOT MAKE FINDINGS AS TO ALL OF SUCH FACTORS?

PARTIES

The Petitioners are:

Liberty County, Florida

Gene Free, Chairman, Commissioner; Joe Burke, James E. Johnson, J. L. Johnson, and John T. Sanders, Commissioners of Liberty County; their successors and agents; all in their official capacities

Liberty County School Board, Florida

Ras Hill, Chairman; Joseph Combs, Tommy Duggar, W. L. Potter, and Herbert Whittaker, members of the Liberty County School Board; their successors and agents; all in their official capacities

The Respondents are:

Gregory Solomon, Patricia Beckwith, Raleigh Brinson, and Earl Jennings

All others similarly situated

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JURISDICTION

The en banc judgment and opinions for which review is sought were entered on the 5th day of April, 1990.

No rehearing was sought on the en banc decision and judgment.

Review by this Court of the judgment and opinions of the Court of Appeals is specifically authorized by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. s 1973 (Section 2 of the Voting Rights Act of 1965, as amended):

§ 1973. Denial or abridgment of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members

of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered; Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

Liberty County is located in Northwestern Florida. According to the 1980 United States Census, it has the following population and voting age population, by race:

	Total	White*	Black
Population	4260	3789	471
% of total		88.94%	11.06%
Voting age population	2990	2678	312
% of total		89.57%	10.43%
% 18 years or older (voting age)	70.20%	70.66%	66.24%

* Includes fewer than 10 persons of other races (neither white nor black)

The Board of County Commissioners of Liberty County and the Liberty County School Board are each comprised of five members. The County is divided into five districts, from each of which a resident is elected to each body. The entire

County electorate, however, votes for one candidate from each district. Members of both bodies are elected for staggered four-year terms. A candidate must receive a majority of his or her party's county-wide vote to be selected as the party's nominee, but in the general election there is no majority vote requirement. (A4-A5)

In 1985, the residency districts for County Commissioners and for School Board members were changed in accordance with a plan proposed by the Respondents. (A254) By the Respondents' plan, 423 of the County's black residents are now located in District I, which leaves less than 50 black persons residing in the other four districts combined. (A254) The trial court found that blacks comprised 49 percent of the total population of District I and 46.2 percent of the

registered voters of District I. (A254) No finding was made as to the District I percentage of voting age population which was black.

Respondents filed their class action complaints in the United States District Court for the Northern District of Florida, Tallahassee Division, against Liberty County, the County Commission members, the Liberty County School Board, and the School Board members, alleging that the at-large system of electing the two five-member bodies unlawfully diluted black voting strength. Jurisdiction was alleged under 28 U.S.C. ss 1331, 1343, 2201, and 2202 and 42 U.S.C. ss 1971(d) and 1973(e).

The Petitioners answered by denying that the at-large system was a violation of Section 2 of the Voting Rights Act. By

stipulation of the parties, the two cases were consolidated for trial.

The distinction between percentages of black population and black voting age population did not appear to be legally significant at the time this case was tried. Trial was held on March 25 through March 28, 1986. (A216) On June 30, this Court decided Thornburg v. Gingles, 478 U.S. 30 (1986), which considerably magnified the importance of population statistics in Section 2 Voting Rights Act cases.

On May 4, 1987, the district court entered judgment for the Petitioners, finding that, based on the totality of the circumstances, the at-large election system in Liberty County did not violate Section 2 of the Voting Rights Act. (A214-A278)

Respondents filed their notice of

appeal on May 28, 1987. On December 12, 1988, the original panel of the Court of Appeals vacated the district court judgment and opinion and remanded for further proceedings. (A129-A231)

On the motion of Petitioners, the Court of Appeals granted a rehearing en banc and, on April 26, 1989, vacated the original panel opinion. (A127-A128)

After en banc review, the Court of Appeals, on April 5, 1990, vacated the district court final judgment and remanded, holding that, as a matter of law, the Respondents had satisfied the three Gingles factors. The Court was, however, evenly divided as to whether the Respondents were forthwith entitled to a judgment or were still subject to a totality-of-circumstances determination by the district court. (A1-A2)

ARGUMENT

I. SHOULD THE COURT'S THORNBURG V. GINGLES OPINION BE CLARIFIED, AS APPLIED TO THE INSTANT CASE, CONCERNING THE LEGAL EFFECT OF THE THREE GINGLES THRESHOLD FACTORS?

The Eleventh Circuit Court of Appeals, in a unanimous en banc opinion issued April 5, 1990, remanded the instant case to the district court for further proceedings in accordance with Thornburg v. Gingles, 478 U.S. 30 (1986). Though unanimous in vacating the district court's judgment and remanding the case, the Court was sharply divided over the legal effect of the three threshold factors adopted in Gingles for Voting Rights Act claims based on multi-district elections:

> We hold, as a matter of law, that the appellants have satisfied the three Gingles factors . . . but we are divided on the legal effect of

> proving those factors. Because we are divided in our interpretation of Gingles and section 2 of the Voting Rights Act . . . we do not specifically direct the district court on how to proceed on remand.
>
> (A2-A3)

The Court split five to five concerning the legal effect of the Gingles factors in three concurring opinions (A4-A39; A40-A115; A116-A125), with the specially concurring opinions of Judge Kravitch and Chief Judge Tjoflat representing the respective positions of the divided Court.

It should again be noted that the trial of this case was concluded prior to this Court's decision in Gingles. The Court of Appeals, however, made findings of fact for the district court, as a matter of law, as to the three Gingles threshold factors, while simultaneously being unable to give instructions as to

the legal effect of such findings. This issue of appellate court fact-finding is addressed separately below.

While there were several opinions by Justices of the Court in Thornburg v. Gingles, that decision appears to resolve two issues: (1) that the three identified factors are a "necessary precondition" for a successful vote dilution claim, as there simply cannot be vote dilution without them, and (2) that the ultimate determination of vote dilution is still based on the totality of the circumstances, as intended by Congress. (This appears to be the interpretation given Gingles by the district court below.)

Judge Kravitch's construction and application of the three Gingles factors, however, is that they are conclusive and

dispositive. This approach is best illustrated by her own words:

> As is evident in my discussion below, proof of the three Gingles factors is both necessary and, in this case, sufficient for a section 2 vote dilution claim. (A18)

This specially concurring opinion, joined by four members of the Court of Appeals, arrived at this conclusive view of Gingles from a somewhat brief discussion of the background of the instant case and the history of the Voting Rights Act of 1965. (A4-A17) The opinion highlighted the development of voting rights claims under the "results test" and specifically emphasized the case law as developed under White v. Regester, 412 U.S. 755 (1973), and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), aff'd. sub nom. East Carroll Parrish School Bd. v. Marshall, 424 U.S. 636 (1976).

Judge Kravitch's opinion also discussed Mobile v. Bolden, 446 U.S. 55 (1980), pointing out the renunciation of the results test in favor of the position that "discriminatory purpose was a necessary element of a claim for vote dilution." (A9) The Bolden decision, of course, prompted the 1982 congressional amendment of section 2 of the Voting Rights Act, restoring the pre-Bolden standard.

Judge Kravitch further reviewed the "Senate Report" factors derived from White and Zimmer, supra, and endorsed by Congress in amending section 2, which--though not an exhaustive list--embody the results test in light of the totality of the circumstances. (A12-A15) Significantly, the opinion did not again mention or discuss the results test, the Senate

Report factors, or the totality of the circumstances, except to state:

> Although a district court may consider the totality of the circumstances, those circumstances must be examined for the light they shed on the existence of the three core Gingles factors.
>
> (A17-A18)

The opinion completely ignored the detailed discussion of the totality of the circumstances by the district court. Instead, the opinion concluded with an application of the Gingles factors to the instant case, finding the evidence sufficient as a matter of law to establish a Voting Rights Act violation:

> In conclusion, the district court erred in failing correctly to apply the Gingles test. Having reviewed the uncontroverted evidence below, I conclude that appellants have met all three Gingles requirements. This is all the Supreme Court requires, and I may require no more. (Emphasis added.)
>
> (A26)

Judge Tjoflat's different interpretation and application of the three Gingles factors is best summarized as follows:

> In summary, Gingles stands for the following propositions:
>
> 1. If the plaintiff cannot prove (1) the existence of a large and compact minority group, (2) that the group is politically cohesive, and (3) that the white majority typically votes as a block, he cannot make out a claim under section 2.
>
> 2. If the plaintiff does prove these three factors, and the defendant offers nothing in rebuttal, the plaintiff wins.
>
> 3. If the plaintiff proves the three factors, and the defendant offers proof of other objective factors in rebuttal, the court must be satisfied, before it may rule in favor of the plaintiff, that, under the totality of the circumstances, the minority group is denied meaningful access to the political process "on account of race or color."
>
> (A101-A102)

Judge Tjoflat's concurring opinion,

therefore, construed the Gingles factors as threshold requirements, essential to the making of a claim under section 2 of the Voting Rights Act but not per se sufficient as a matter of law. Judge Tjoflat's opinion provided a detailed analysis of the legislative history of the Voting Rights Act and the development of its corresponding case law. (A45-A103) More than summary treatment, however, is unfortunately beyond the scope of this Petition.

Four criticisms of Judge Kravitch's approach are evident in Judge Tjoflat's opinion:

1. The mechanical application of the Gingles factors as both necessary and sufficient produces a tautological and inflexible rule of law, allowing plaintiffs to establish an irrebuttable

prima facie case. (A91, A100, A107)

2. The Kravitch approach effectively eliminates the totality-of-the-circumstances test. (A107) As noted by Judge Tjoflat, inclusion of Senator Dole's proposed language expressly incorporating the totality-of-the-circumstances test was essential to passage of the 1982 amendment to section 2 of the Voting Rights Act. (A273-A274)

3. Judge Kravitch's mechanical application of the Gingles factors renders nonsensical this Court's discussion of the totality of the circumstances in Gingles after the Court noted the success of the Gingles plaintiffs in proving the three factors, and after it approved the district court's careful consideration of the totality of the circumstances. (A101)

4. The Kravitch approach creates a right to proportional representation for all compact and cohesive minority groups constituting a majority of an appropriately designed single-member district. (A105-A106, A112-A114)

Additionally, Judge Tjoflat enumerated the following important questions neglected by the Kravitch concurrence:

> When could a section 2 plaintiff lose even though he has proven the three Gingles factors? How did Judge Kravitch decide in this case that the appellants' evidence was sufficient to require judgment in their favor as a matter of law? How may a defendant rebut a section 2 claim when the three Gingles factors have been proven?
>
> (A43)

It should not be assumed, however, that Judge Tjoflat and the other Judges joining his opinion view Gingles as clearly and straightforwardly as did the

district court in this case. Judge Tjoflat's specially concurring opinion includes the four-step test outlined in his opinion for the original panel. (A40, A108) That test is: (1) Is the minority underrepresented in proportion to its percentage of the total electorate? (2) Does the minority group have sufficient geographic and political cohesion to permit one or more minority-controlled single-member districts? (3) Is the current electoral system driven by racial bias? and (4) Will the system continue to deny minorities equal access to the political system? (A158-A159) According to the panel Judges, the various totality-of-the-circumstances factors mentioned in Gingles and earlier opinions relate only to the third question. (A108, A158-A159)

The Eleventh Circuit Court of Appeals, in Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547 (11th Cir. 1987), has also arrived at yet another interpretation of Gingles, which appears to be closer to the clear and straightforward manner in which the district court herein applied it.

In sum, the completely divergent and conflicting interpretations of Gingles by the Court of Appeals of the Eleventh Circuit create a compelling need for clarification and guidance by this Court. The need for such clarification and guidance is even more significant in light of the 1990 U.S. census, scheduled for publication in April of 1991, and its potential impact on Voting Rights Act claims. Whether or not the three Gingles factors are to be mechanically and

conclusively applied, based on the new census data, will be an extremely important issue to every State and political subdivision, but particularly to the Petitioners and others who could find themselves greatly affected by very slight changes in numbers.

II. SHOULD THE COURT'S GINGLES OPINION BE CLARIFIED, AS TO HOW SMALL A MINORITY MAY BE ENTITLED TO A REMEDY FOR ALLEGED VOTE DILUTION, IN VIEW OF THE DISCLAIMER OF ANY RIGHT TO PROPORTIONAL REPRESENTATION IN THE VOTING RIGHTS ACT OF 1965?

In the instant case, the district court found that the complaining minority constitutes 11.06% of the total population of Liberty County. This percentage translates to 471 persons out of a total population of 4,260.

Historically, the focus of racial vote dilution actions concerned minority

groups that were not getting their "number's worth" in terms of political influence. In Whitcomb v. Chavis, 403 U.S. 124, 156 (1971), this Court stated that a group entitled to a remedy for vote dilution must be "numerous enough to command at least one seat and represent a majority living in an area sufficiently compact to constitute a single member district." (Emphasis added.) Logically, the smaller a group is as a percentage of the total population, regardless of its potential to constitute a majority of a single member district, the greater the danger of creating an entitlement to proportional representation, which is specifically disclaimed in section 2 of the Voting Rights Act.

Certainly it was not the intent of Congress in amending the Voting Rights

Act in 1982 to insulate any group from normal political defeat, and it becomes increasingly difficult to draw the line between normal political defeat and vote dilution when a minority's numbers do not constitute "a seat's worth" on a proportional basis. Mechanistic application of the Gingles factors affords no safeguards against the creation of a right to proportional representation.

Mechanically applying a 51%-of-any-possible-district test, as it appears Judge Kravitch would do is--purely and simply--proportional representation in its worst form. (Actually, it was not even a 51% figure on which many of the pre-Gingles decisions focused, but 65%--the percentage which appeared to be necessary to give an effective remedy in fashioning single-member districts.)

Justice O'Connor, in her Gingles concurrence, warned of this consequence in stating:

> [A]lthough the Court does not acknowledge it expressly, the combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single member districts.

478 U.S. at 85.

The instant case is a perfect illustration of how mechanical application of the Gingles factors creates a right to proportional representation. As stated above, the complaining minority herein constitutes only 11.06% of the total population of Liberty County. In other words, the total minority population is not only less than "a seat's

worth" on a proportional basis, it barely constitutes one-half the numbers represented by a seat as a percentage of the total population. Mechanical application of the Gingles factors to the instant case, as urged by Judge Kravitch, not only creates a right to proportional representation, but a right to disproportional representation. Stated differently, the complaining minority herein is given an entitlement to not only its "number's worth," but to almost twice its number's worth.

Under the Kravitch approach in this case, a tiny minority group, sufficiently concentrated within a political subdivision to give it a bare majority in a possible single-member district, would be entitled to its own seat under the Voting Rights Act. What, then, would prevent a

court from requiring the creation of more seats so as to accommodate an even tinier minority group? After all, the number of seats is also "a voting standard, practice, or procedure" which could give rise to a violation of the statute. That, however, is a right to proportional (or less than proportional) representation.

In section 2 of the Voting Rights Act, Congress unequivocally stated its disclaimer of any right to proportional representation: "Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973. Perhaps the real question here is, when and how, in terms of results, is a right to proportional representation created? Otherwise, the above-quoted language is a

nullity.

There is a compelling need for this Court to provide clarification and guidance concerning this issue, as impacted by the Gingles factors in the instant case, particularly if the mechanical approach of Judge Kravitch is adopted by this Court.

III. MAY AN THE COURT OF APPEALS MAKE CONCLUSIVE FACTUAL FINDINGS, AS A MATTER OF LAW, AS TO THE THRESHOLD FACTORS ADOPTED IN GINGLES, IN A CASE WHICH WAS TRIED BEFORE GINGLES WAS DECIDED, WHEN THE EVIDENCE WAS DISPUTED AND WHEN THE TRIAL COURT DID NOT MAKE FINDINGS AS TO ALL OF SUCH FACTORS?

The trial court herein made the following findings of fact:

1. North Florida and Liberty County have a long history of extensive official discrimination affecting the rights of blacks to participate in political

processes. (A220)

2. While the Respondents had established a statistically significant degree of racial bloc voting by black voters, there was no analysis of white voting patterns and no evidence of white and black preferences as to non-minority candidates; therefore, Respondents had not proven any legally significant racial polarization in terms of the Gingles standards. (A220-A237)

3. A party nomination majority vote requirement and the large size of Liberty County to cover in an at-large election may enhance the opportunity to discriminate against blacks in the election process. (A238)

4. Blacks have not been denied access to an existing informal slating process. (A239)

5. There is no significant impediment to black political participation in Liberty County, and black political participation in recent years has been substantial. (A243-A244)

6. Recent campaigns in Liberty County have not been characterized by overt or subtle racial appeals. (A246-A247)

7. No black has ever been elected to countywide office in Liberty County. (A247)

8. Although even the Respondents testified that the elected officials in Liberty County are approach-able and sensitive to the particularized needs of black citizens, a finding of a significant lack of responsiveness to the interests of blacks by Liberty County's elected officials was necessary, based

upon the school system's treatment of Mr. Stallworth in refusing to promote him to principal, as detailed in Stallworth v. Shuler, 35 F.E.P. 770 (N.D. Fla. 1984), aff'd 777 F.2d 1431 (11th Cir. 1985). (A248-A249)

9. At-large elections in Liberty County are in conformance with a State policy which is not tenuous and which was not racially-motivated. (A250-A253)

10. In a District drawn at the Respondents' request, containing virtually all the black residents of Liberty County, blacks still comprise only 49 percent of the population and 46.2 percent of the registered voters and could still not elect their own candidate in a completely racially-polarized districtwide election. (A253-A257)

11. Blacks in Liberty County are

perceived by all candidates as a 'swing vote' crucial to success, and--in spite of the treatment of Mr. Stallworth by the school system--white elected officials are available, responsive, and sensitive to black voters. (A257-A259)

12. Because of the 'swing vote' influence of black voters, many members of the Respondent class, including two of the four named Respondents, are ambivalent about or opposed to single-member districts, and believe their greatest political influence lies in an at-large election system. (A260-A261)

13. Based on the totality of the circumstances, blacks in Liberty County suffer no dilution of their votes as a result of at-large elections and do not have less opportunity than whites to participate in the election process and

to elect representatives of their choice. (A269-A276)

On appeal to a three-judge panel, the Court of Appeals unanimously vacated the judgment and remanded for further proceedings. (A195-A196) In an opinion authored by Judge Tjoflat, the Court interpreted Thornburg v. Gingles as establishing a four-step test for finding a Voting Rights Act violation based on vote dilution by an at-large election system. (A158-A159) (This test was not adopted by a majority of the Court of Appeals in the en banc decision.)

In arriving at its conclusions, the Tjoflat opinion disagreed with the trial court's findings of fact numbered above as 1, 2, 3, 4, 6, 8, 9 and 10. The disagreements primarily focused on the failure of the trial court to explain the

bases for some of the findings, the failure of the trial court to relate its findings to the four-step test espoused by Judge Tjoflat, or the trial court's characterization of the quality and credibility of the Respondents' evidence. (A172-A191) Judge Tjoflat's opinion also held that findings numbered above as 11 and 12 were not relevant to the ultimate determination expressed above as number 13 (A192-A195), and it directed a reconsideration of the evidence by the trial court. (A195-A196)

After rehearing en banc, the Eleventh Circuit Court's per curiam opinion held "as a matter of law, that the [Respondents] have satisfied the three Gingles factors" and remanded to the district court for further proceedings, without instructions because the

panel could not agree as to the effect of those three findings. (A2-A3) It is clear from references to two of the specially concurring opinions that the "three Gingles factors" referred to were: (1) that blacks were numerous and concentrated enough to control a single-member district; (2) that blacks in Liberty County are politically cohesive; and (3) that the whites in Liberty County vote sufficiently as a bloc that they are usually able to defeat the blacks' pre-ferred candidate. (A2, A18-A24, A42, A108)

It is also clear from the evenly-divided Court in this case that Gingles requires some clarification. Perhaps because the Court of Appeals was so intent on attempting to resolve its vastly-different interpretations of

Gingles, or because of its frustration in not being able to do so, the en banc per curiam opinion and remand violates several established legal precepts, beginning with the "clearly erroneous" standard set out in Rule 52(a), Federal Rules of Civil Procedure.

This Court, in Thornburg v. Gingles, at 478 U.S. 78-9, reaffirmed that the clearly erroneous standard applies not only to the subsidiary factual determinations in a voting rights case, but also to the ultimate factual conclusion of vote dilution because of multimember districts. In regard to the first Gingles threshold finding which the per curiam opinion held to have been proved as a matter of law (that a minority group is large enough and sufficiently concentrated to control a single-member

district), the trial court made exactly the opposite finding, based on its specific findings that blacks did not constitute a majority of the population, or a majority of the registered voter population, in the one Liberty County district where almost all of the County's black citizens resided.

In the original opinion of Judge Tjoflat, who also authored one of the specially concurring opinions after the en banc hearing, he incorrectly indicated that the trial court's conclusion on this issue was based on registered voting age population as being the determinative factor. However, it was both registered voter population and total population that the trial court used. (A254) Judge Tjoflat, in his original opinion, and Judge Kravitch, in her en banc concurring

opinion, nonetheless determined that the black voting age population for the same district was 51% (A20, A162) and that such a percentage was sufficient to meet the first Gingles standard. The trial court, however, made no finding of fact at all as to the black voting age population percentage in the district. It should be given the opportunity to do so, however, before this issue is resolved herein "as a matter of law."

This is particularly true since, as Judge Tjoflat's original opinion notes, the Gingles opinion "seems to refer simply to gross minority population" (A163) and neither the trial court herein nor the Respondents had the benefit of any different interpretation of the standard when this case was tried or decided. The only evidence in the record

as to percentage of black voting age population in District I was the Respondents' unverified estimate of 51%, which was not challenged by the Petitioners because of the 49% total population estimate. Nevertheless, it can be demonstrated from other information in the record, plus census data judicially noticeable, that the 51% estimate cannot possibly be correct.

Using figures found by the trial court and census data included in the Statement of the Case, if there are 423 blacks in District I and that number comprises 49% of the District I population, there are 863 total persons in the district, 440 of whom (51%) are white. Pursuant to the census, the Liberty County blacks tend to be slightly younger. (Only 66.24% of them are 18 or

older, compared to 70.66% of the whites; the countywide average is 70.20%.) Using the countywide average, of the 863 persons in District I, there are 606 persons of voting age. For 51% of that number to be black, as 'found' by the Court of Appeals, 309 of the County's 312 blacks of voting age would have to live in District I. That would mean only three of the 48 black persons living outside District I would be of voting age, or only 6.25% of them, but that would be less than one-tenth of the statistical average for blacks county-wide. It would also mean a great number of children living on their own outside of District 1!

Petitioners believe that it can be demonstrated from other census data (for the Enumeration Districts from which the

County's residency districts were created) that a 51% voting age majority in District I is not only extremely improbable, but statistically impossible. Such a demonstration, however, is more appropriately made at the trial court level. Suffice it to say that even Judge Tjoflat, in his original opinion, was hesitant to rely on the Respondents' unverified estimate and stated:

> On remand, the district court may make further inquiries into the exact demographics of the proposed District I to ensure that blacks will constitute a majority of its voting age population.
>
> (A201)

Nothing in the record has changed or been verified or become more reliable since the original appeal. If percentage of black voting age population is now to be <u>the</u> determinative factor, the trial court should be given the opportunity to

make a finding from the total record and any matters judicially noticeable as to the actual black voting age population percentage in the district. For the decision in this case to hinge on an unverified estimate of a number which, at the time of trial, was not a determinative factor because Gingles had not yet been decided, would be a total usurpation, "as a matter of law," of the trial court's fact-finding authority and capacity.

The Court of Appeals also held that the second and third Gingles standards had been established herein "as a matter of law." These standards are that blacks in Liberty County are politically cohesive and that whites vote sufficiently as a bloc as to usually defeat the blacks' preferred candidates. The trial court

had not made two separate findings on these issues. Instead, not having the benefit of any subsequent analyses and explanations of the Gingles opinion, the trial court found that voting in Liberty County was not "racially polarized". The Court's explanation of that finding was clearly that, while there was statistically significant evidence of black racial bloc voting, the Respondents had not proved that Liberty County racial bloc voting was legally significant in terms of a vote dilution challenge, meaning that there was no evidence of white bloc voting sufficient to usually prevent blacks from electing candidates of their choice. (A224-A237)

The Respondents' evidence on these issues was limited to a bivariate regression analysis, which the trial court

recognized as being an acceptable method of proving racial bloc voting in accordance with Gingles. (A228) The trial court, however, had several reservations as to the conclusions reached by the Respondents' one expert witness as a result of the data generated by the regression analysis (A225-A226, A230-A233), as well as the validity of the expert's inferences and assumptions (A233, A235-A236), and the court's reservations were supported by an expert witness called by the Defendants. (A223) In addition, the Respondents' expert only measured black voting patterns, not white, and the expert's own figures showed that, of the only four black candidates to ever have run for county-wide office in Liberty County, two of them received considerable white vote

(33% and 40.5%) in races against a single white opponent. (A210-A211)

Finally, there was no attempt by the Respondents or their expert witness to show how often the preferred candidates of Liberty County blacks were elected to office. The Respondents' figures merely showed that the only four black candidates ever to have run in Liberty County were supported by black voters but were defeated. The Respondents produced no evidence as to how many total candidates (both black and white), which were preferred by Liberty County black voters, had been elected or defeated. That, however, is the true test of a vote dilution claim, and the trial court's conclusion was supported by the record, while the Circuit's Court's factual finding "as a matter of law" was not.

In Gingles, this Court reaffirmed that the Voting Rights Act is intended to prohibit a majority from diluting the ability of members of a minority group to elect "representatives of their choice" --not "minority representatives of their choice"--and that it is the "status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important." 478 U.S. 68. The Eleventh Circuit Court, subsequent to Gingles, also has interpreted the Voting Rights Act in exactly this manner. Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547, 1557 (11th Cir. 1987).

Nevertheless, the Eleventh Circuit here has substituted its opinion for that of the trial court and held that white voters in Liberty County will usually

vote sufficiently as a bloc so as to defeat the preferred candidates of black voters, and it has done so on a record which only shows that four particular candidates (who happened to be black) who were supported by black voters were defeated; that two of these candidates received considerable support from white voters; and that, while the Respondents produced no evidence as to black voters' success in all other Liberty County elections, the black voters are generally perceived in Liberty County as being the 'swing vote' likely to decide any race.

The trial court herein interpreted Gingles as requiring an ultimate finding of whether or not the black voters of Liberty County have suffered a vote dilution because of at-large elections, based on the totality of the circum-

stances. (A264-A269) Judge Tjoflat and four other Eleventh Circuit Judges read Gingles as requiring a four-step determination, with the totality-of-the-circumstances factors mentioned in Gingles and earlier opinions relating only to the third question. (A108, A158-A159) Judge Hill also views Gingles as not requiring single-member districts, no matter the findings as to the three threshold issues, when, as in Liberty County, single-member districts would lessen the political influence of black voters. (A122-A125) Judge Kravitch and four other Eleventh Circuit Judges interpret Gingles as requiring single-member districts whenever the three threshold factors are present, regardless of any other factor. (A26)

However, even though the Eleventh

Circuit Judges cannot agree as to what the law is that the trial court is to apply on remand in determining factual issues, it could be argued that the Circuit Court did not re-evaluate the weight and credibility of the evidence and substitute its judgment for that of the trial court, but that it merely set aside the trial court's findings for errors of law. Even in such a case, this Court has found to be "incredible" a Circuit Court's determination that it had the authority

> . . . to permit it to examine the record and make its own independent findings with respect to those issues on which the district court's findings are set aside for an error of law. . . . [W]hen a district court's finding on such an ultimate fact is set aside for an error of law, the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance.

Pullman-Standard v. Swint, 456 U.S. 273, 293 (1982).

In Pullman-Standard, at 456 U.S. 292, the Court also held that a remand for further fact-finding is required when the trial court fails to make a relevant finding of fact, as in this case when the court made no finding as to the percentage of black voting age population in the relevant district.

Shortly after its decision in Gingles, this Court remanded another voting rights case for reconsideration in light of the Gingles opinion. Collins v. City of Norfolk, 478 U.S. 1016 (1986). The Fourth Circuit Court in that case, rather than make its own findings of fact based on its interpretation of Gingles, remanded to the trial court for further findings. Collins v. City of Norfolk,

816 F.2d 932 (4th Cir. 1987). That is exactly what the Court of Appeals should have done in this case.

Interestingly, the subsequent district court opinion in Collins v. City of Norfolk, 679 F.Supp. 557 (E.D. Va. 1988), appears to interpret Gingles much more clearly and straightforwardly than did any of the Eleventh Circuit Judges in this case. In fact, the ultimate district court decision in Collins is very similar to the district court decision in this case, since in Collins it was held that:

1. A mere preference for different candidates by different races is not legally significant. 679 F.Supp. at 566.

2. Polarized voting is not legally significant unless white bloc voting usually defeats minority-preferred

candidates. Id.

3. While regression analysis is acceptable as a method of proving racial bloc voting, the validity or probative value of any particular study may be undercut by methodological flaws. 679 F.Supp. at 571.

4. Unreliable figures and unreliable conclusions in a regression analysis may distort the results. 679 F.Supp. at 572.

5. It is a candidate's status as the choice of a minority racial group, not the candidate's race, which is of legal significance. Id.

6. In the City of Norfolk, in spite of a questionable bivariate regression analysis which established a pattern of racial bloc voting, more than half of all candidates receiving majority black

support were elected over an eighteen-year period. Id.

7. Determinations as to alleged Voting Rights Act violations cannot be made on a mechanical basis, but must be made based on the totality of the circumstances, which in turn, quoting Gingles, must be based on "a searching, practical evaluation of the 'past and present reality,' and on a 'functional' view of the political process." 679 F.Supp. at 586.

The trial court in Collins was again reversed and remanded (on grounds not involved in the instant case) in Collins v. City of Norfolk, Va., 883 F.2d 1232 (4th Cir. 1989), and is now pending before this Court again on a granted Petition for Writ of Certiorari.

In spite of attempts by the Eleventh

Circuit Judges to reduce Gingles to one or another mechanical formula, the Gingles opinion clearly reinforces the pre-Gingles law that the totality of the circumstances determines the outcome of a Voting Rights Act Section 2 claim and that trial judges are much better suited, are in a much better position, and are more competent to make the factual findings necessary to determine the claim. In Rogers v. Lodge, 458 U.S. 613, 622-3 (1982), this Court held that Rule 52(a) makes no exceptions for different categories of findings; that the rule applies both to determinative findings and to subsidiary findings in a vote dilution case; and that findings of district court judges in such cases should not be set aside unless clearly erroneous,

> . . . 'representing as they do a blend of history and intensely local appraisal of the design and impact of the . . . multimember district in the light of past and present reality, political and otherwise.'

458 U.S. 622, quoting White v. Regester, 412 U.S. 755, 769-70 (1973).

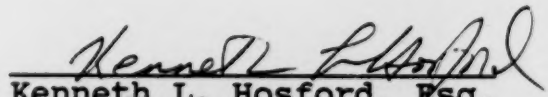
CONCLUSION

This post-Gingles case comes to this Court from an en banc decision of a Court of Appeals which reversed a district court finding of no violation of Section 2 of the Voting Rights Act. The Court of Appeals, however, was hopelessly deadlocked as to what, upon remand, Gingles required of the district court. Unless this Court resolves critical issues of federal law raised by the apparent ambiguity of Gingles, enormous burdens will be imposed upon the judiciary and untold litigation hours and expense will

be incurred in this and like cases.

The Petition for Writ of Certiorari should, therefore, be granted.

Respectfully submitted,



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90-102

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LIBERTY COUNTY, FLORIDA, ET AL,
AND
LIBERTY COUNTY SCHOOL BOARD, ET AL,
Petitioners,

versus

GREGORY SOLOMON, ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS, ELEVENTH CIRCUIT.

APPENDIX
VOLUME I

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VOLUME I

VOLUME II

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-3406

(D.C. Docket Nos. 85-7010-MMP &
85-7009-MMP)

GREG SOLOMON, et al.,

Plaintiffs-Appellants,

versus

LIBERTY COUNTY, FLORIDA, et al.,

Defendants-Appellees.

GREGORY SOLOMON, et al.,

Plaintiffs-Appellants,

versus

LIBERTY COUNTY SCHOOL BOARD, FLORIDA, et al.,

Defendants-Appellees.

Appeal from the United States District
Court for the Northern District
of Florida

(April 5, 1990)

Before TJOFLAT, Chief Judge, FAY, VANCE*, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, EDMONDSON, AND COX, Circuit Judges, and HILL**, Senior Circuit Judge.

PER CURIAM:

We unanimously vacate the district court's judgment and remand the case for further proceedings in accordance with the Supreme Court's pronouncement in Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752 (1986). We hold, as a matter of law, that the appellants have satisfied the three Gingles factors, see post at 38 (Tjoflat, C.J., specially concurring), 10 (Kravitch, J., specially concurring), but we are divided on the legal effect of proving those factors. Because we are divided in

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*Honorable Robert S. Vance, Circuit Judge, was a member of the en banc court which heard oral argument, but due to his death on December 16, 1989, did not participate in the disposition of this case.

**Honorable James C. Hill, Senior Circuit Judge, has elected to participate in the consideration and disposition of this case. (See 28 U.S.C. § 46 (c).

our interpretation of Gingles and section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1982), we do not specifically direct the district court on how to proceed on remand. Rather, we instruct the district court to proceed in accordance with Gingles, giving due consideration to the views expressed in Chief Judge Tjoflat's and Judge Kravitch's specially concurring opinions. This case in VACATED and REMANDED for further proceedings.

IT IS SO ORDERED.

KRAVITCH, Circuit Judge, specially concurring, in which JOHNSON, HATCHETT, ANDERSON and CLARK, Circuit Judges, join:

Appellants brought these cases alleging that the at-large method of electing county commissioners and school board members in Liberty County, Florida denies black voters a fair opportunity to participate in the political process and to elect candidates of their choice. This court granted appellants' petition for rehearing in banc to clarify the plaintiff's burden of proof in a claim under section 2 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982).

I. BACKGROUND

Both the county commission and the school board in Liberty County, Florida consist of five members who serve staggered four-year terms. Fla. Const. Art. VIII, § 1(e) (county commission);

Fla. Stat. § 100.041(3) (1987) (school board). The county is divided into five districts; candidates for the commission and the school board run from the district in which they live. Fla. Const. Art. VIII, § 1(e) (commission). Fla. Stat. § 124.01 (1987) (commission); id. § 230.061 (school board). In both the primary and general elections, the entire county electorate votes for one candidate from each residence district. Id. § 100.041(2) (commission); §§ 230.08-.10 (school board). A candidate must receive a majority of the countywide vote to be selected as his party's nominee in the primary election. If no candidate receives a majority of the vote in the primary, a run-off primary election is held. See §§ 100.061. 100.091. In the general election, candidates must obtain a plurality of the countywide vote to win election. Id. §§ 100.181; 230.10.

Blacks comprise eleven percent of the population of Liberty County. Under the present residency district lines, blacks comprise 49 percent of the total population of District 1, and 51 percent of the total population of voting age in that district. There have been four black candidacies for elected countywide offices in Liberty County: three for the school board and one for the county commission. All of the black candidates have been unsuccessful.

Appellants seek injunctive relief, contending that the county should be divided into five districts, each of which would elect a single member to the commission and to the school board. The new geographical division would create a district with a black majority. The district court ruled in favor of appellees, finding that black voters exercise more political influence under

the current system than they would under any single-member district plan. Solomon v. Liberty County, Florida, Nos. TCA 85-7009-MMP & TCA 85-7010-MMP, slip op. (N.D. Fla. 1987). On appeal, a panel of this court vacated the judgments of the district court and remanded for further proceedings on the ground that the district court analyzed the evidence under an erroneous legal standard. Solomon v. Liberty County, Fla., 865 F.2d 1566, 1573 (11th Cir. 1988), vacated, 873 F.2d 248 (1989).

II. SECTION 2 OF THE VOTING RIGHTS ACT

The proof required to establish a claim for voting discrimination has been changed twice since the Voting Rights Act was passed in 1965.[1] Until 1980, voting discrimination cases were governed by the "results test." Whitcomb v. Chavis, 403 U.S. 124, 149, 91 S.Ct. 1858, 1872-73, ____ L.Ed.2d ____ (1971); White v.

Regester, 412 U.S. 755, 766 (1973); Zimmer v. McKeither, 485 F.2d 1297, 1304-05 (5th Cir. 1973), aff'd on other grounds sub nom. East Carroll Parish School Bd. v. Marshall, 424 U.S. 636, ____ S.Ct. ____, ____ L.Ed.2d ____ (1976). Under this test, plaintiffs could prevail by showing that, under the totality of the circumstances, the challenged electoral procedure had the result of denying a minority group equal opportunity to participate in the political process. Zimmer identified numerous factors that would influence a finding of exclusionary results. 485 F.2d at 1305. Plaintiff's were not required to demonstrate that lawmakers had acted intentionally to exclude minorities.

Then, in Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), the Supreme Court renounced the results test. Although there was no majority

opinion in Bolden, at least five justices took the position that discriminatory purpose was a necessary element of a claim for vote dilution. In order to establish a violation of either section 2 of the Voting Rights Act of 1965 or of the Fourteenth or Fifteenth Amendments, plaintiffs were required to prove that officials adopted or maintained a challenged electoral mechanism with the intent to discriminate against minority voters. Zimmer, a plurality of the Court explained, was "decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause -- that proof of a discriminatory effect is sufficient." Bolden, 446 U.S. at 71, 100 S.Ct at 1501-02. The plurality said that henceforth a necessary ingredient of a successful claim of minority vote dilution was evidence

that officials "'conceived or operated [a] purposeful devic[e] to further racial discrimination.'" Id. at 70, 100 S.Ct. at 1501 (quoting Whitcomb, 403 U.S. at 149, 91 S.Ct. at 1872).

In 1982, largely in response to the Court's decision in Bolden, see S. Rep. No. 417, 97th Cong., 2d Sess. 24-39, reprinted in 1982 U.S. Code Cong. & Admin. News 177 (hereinafter S. Rep.), Congress amended section 2 of the Voting Rights Act to restore the legal standard that governed voting discrimination cases prior to Bolden.[1] S. Rep. at 27. In adopting the results test, Congress sought to remedy several problems engendered by the subjective intent test. First, the intent test "asks the wrong question." id. at 36, by probing the racial motives of lawmakers rather than determining whether minorities can participate equally in the political system. "If [minorities] are denied a

fair opportunity to participate . . . the system should be changed, regardless of what may or may not be provable about events which took place decades ago." Id. Second, Congress found the intent test unnecessarily divisive because it requires charges of racism on the part of officials or entire communities, a consequence which the results test avoids. Id. Finally, the intent test places too high an evidentiary burden on plaintiffs, often involving attempts to reconstruct the motives of persons long dead from incomplete or even non-existent official records. Id. at 36-37. See also Note, To Infer or Not to Infer a Discriminatory purpose: Rethinking Equal Protection Doctrine, 61 N.Y.U. L. Rev. 334, 343-44 (1986) (summarizing the difficulties of proving discriminatory intent).

Congress found that the intent test diminished the effectiveness of the Voting

Rights Act as a means of fighting voting discrimination. Explaining its rejection of Bolden, see S. Rep. at 31-34, 37-39, the Committee on the Judiciary noted that "[i]t was only after the adoption of the results test and its application by the lower federal courts that minority voters in many jurisdictions finally began to emerge from virtual exclusion from the electoral process. We are acting to restore the opportunity for further progress." Id. at 31.

The Senate Report set forth several "factors" derived from White, Zimmer, and other voting rights cases, a showing of which will typically establish a section 2 violation:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or

political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. at 28-29 (footnotes omitted). The report listed two additional circumstances that might be probative of a violation:

whether there is a significant lack of responsiveness on the part of

> elected officials to the particularized needs of the members of the minority group;
>
> whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 29 (footnotes omitted). The Report stressed that plaintiffs are not required to prove any particular number of the listed factors, and that other factors not listed might be probative in some cases, because the results test examines the totality of the circumstances. Id. at 29 & n.118; Armour v. Ohio, 895 F.2d 1078, 1084 (6th Cir. 1990).

Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), presented the first opportunity for the Supreme Court to interpret the effect of the 1982 amendment on plaintiff's burden under section 2. Addressing the factors enumerated in the Senate Report, the Court recognized that some or all of the factors

might be relevant, but emphasized that the existence of racial bloc voting was the essence of a successful vote dilution claim. Id. at 46, 48-49. To prevail under section 2, a plaintiff challenging a multidistrict plan must fulfill three requirements:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it -- in the absence of special circumstances, such as the minority candidate running unopposed . . . -- usually to defeat the minority's preferred candidate.

Id. at 50-51. See also Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547, 1550 (11th Cir. 1987) (Gingles "established a new three-part test for analyzing minority vote dilution claims under Section 2 of the Voting Rights Act.").

Gingles made clear that the 1982 amendment to section 2 obviated the need for plaintiffs to prove that the contested electoral mechanism was adopted or maintained with the intent to discriminate against minority voters. Gingles, 478 U.S. at 43-44, 106 S.Ct. at 2762-63. The only question, the Court explained, "is whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'" Id. at 44, 106 S.Ct. at 2762-63 (quoting S. Rep. at 28). Thus, if plaintiffs are able to establish that the challenged electoral practice has the effect of diluting minority voting strength, defendants cannot argue as an affirmative defense that the practice was adopted or maintained for a nondiscriminatory reason.[1]

Recently the Eighth Circuit in Whitfield v. Democratic Party of Arkansas similarly concluded that the legislative history and text of section two, and the

Supreme Court's decision in Gingles repudiate the injection of discriminatory intent into a section two claim. 890 F.2d 1423, 1429-30 (8th Cir. 1989); see also Armour, 895 F.2d at 1083 (relying on legislative history to reject intent test for section two claims). "While proof of [discriminatory] intent may be used to show a violation of section 2, such proof is not required of a plaintiff under the statutory language." 890 F.2d at 1429 (citations omitted).

III. APPLYING THE GINGLES TEST

The district court failed to pay sufficient deference to the three part vote dilution test laid out by the Supreme Court in Gingles and recognized by this court in Carrollton.[9] Although a district court may consider the totality of the circumstances, those circumstances must be examined for the light they shed on the existence of the three core Gingles

factors. The Supreme Court made clear that the three part test of Gingles is a threshold that a plaintiff must meet in order to maintain a section 2 claim; the Court recognized, however, that "the other factors, such as the lingering effects of past discrimination, the use of appeals to racial bias in election campaigns, and the use of electoral devices which enhance the dilutive effects of multimember districts when substantial white bloc voting exists-- for example antibullet voting laws and majority vote requirements, are supportive of, but not essential to, a minority voter's claim." 478 U.S. at 48 n.15, 106 S.Ct. at 2765 n.15 (emphasis in original). As is evident in my discussion below, proof of the three Gingles factors is both necessary and, in this case, sufficient for a section 2 vote dilution claim.[1] Applying the Gingles test to the uncontroverted statistical evidence below,

it is apparent that the appellants met each of the three Gingles requirements as a matter of law.[1]

A.

The first Gingles test requires appellants to show that blacks in Liberty County constitute a group sufficiently large and geographically compact that they would have the potential to elect their own representatives under a single-member district scheme. Gingles, 478 U.S. at 50 & n.17, 106 S.Ct. at 2766 & n.17. If a minority group is too small or dispersed to elect its own representatives under any reasonable alternative plan, then an at-large system cannot be responsible for that group's inability to elect its candidates.

Although blacks comprise only 11% of Liberty County's total population, the undisputed demographic evidence indicates that the black population is concentrated

in the northwest region of Liberty County. The current residency districts already divide the county into five equally populous regions. These district lines could thus be used to hold single-member district elections. In District 1, blacks represent 49% of the total population, 51% of the voting age population, and 46% of the registered voting age population.

The district court incorrectly relied in part on the registered voter statistic and ignored the proportion of voting age residents who are black. An at-large election system that frustrates the ability of minorities to elect their chosen representatives will naturally reduce the incentive for blacks to register to vote. The district court thus relied on an indicator which might reward and perpetuate a history of disenfranchising blacks.

The racial composition of voting age residents is one accurate measure of the potential for a minority group to elect their own representatives. Here, the undisputed evidence shows that blacks would constitute a majority of District 1's voting age population. That conclusively establishes that blacks are a sufficiently large and geographically compact group in Liberty County to be eligible for relief under the Voting Rights Act.[1]

B.

The second Gingles test requires proof that blacks in Liberty County are politically cohesive. An at-large system cannot be responsible for submerging a minority group's political interests if that group does not have common interests evidenced by a pattern of bloc voting. Gingles, 478 U.S. at 51, 106 S.Ct. at 2766-67. Plaintiffs may establish

minority bloc voting by showing that a significant number of minority group members usually vote for the same candidates. Id. at 56, 106 S.Ct. at 2769.

Ordinarily, direct evidence of minority voting patterns is unattainable, since ballots do not indicate a voter's race. Instead, appellants presented statistical evidence prepared by Professor Douglas St. Angelo of Florida State University. One technique used by Professor St. Angelo was to estimate the number of white votes cast for a candidate based on the election results in virtually all-white precincts. From this estimate, Professor St. Angelo calculated the number of black votes cast for the candidate by subtracting the estimated number of white votes from the overall total. Professor St. Angelo applied this analysis to the six countywide elections involving black candidate and found that, excluding one

candidacy, blacks received between 75 and 100 percent of the black vote.[1]

Another technique used by Professor St. Angelo was to perform regression analyses showing the correlation between the percentage of registered black voters in a precinct and the percentage of the vote a candidate received. Professor St. Angelo performed these analyses on three types of elections: elections involving black candidates for county office, elections involving black candidates for national office, and elections involving racial issues or themes. In fourteen of sixteen elections, there was an exceptionally strong positive correlation between the number of registered black voters and the number of votes received by the candidate expected to receive black support.[1]

In Gingles the Supreme Court found that black support for black candidates

was "overwhelming" based on evidence that was substantially similar to the evidence in this case.[11] 478 U.S. at 59, 106 S.Ct. at 2770-71. I conclude that appellants' uncontroverted statistical evidence was sufficient to establish black political cohesiveness as a matter of law.

C.

Finally, the third Gingles test requires appellants to demonstrate that whites in Liberty County vote sufficiently as a bloc that they usually are able to defeat the minority's preferred candidate. 478 U.S. at 56, 106, S.Ct. at 2769.

Appellants presented strongly persuasive evidence of white vote polarization. It was undisputed that the average white crossover vote was twenty-one percent in the six countywide elections that involved black candidates.[11] This means that on average nearly eighty per cent of whites in

Liberty County have voted as a bloc in elections involving black candidates for county office. The district court correctly noted that the white vote in Liberty County is not as polarized as the black vote. However, because blacks comprise only 11% of the County's population, even a moderate degree of white voter polarization is sufficient to defeat the candidates preferred by black voters.

Not a single black has ever been elected in Liberty County.[11] The most cross-over support any black candidate has ever received is 40.5% of the white vote.[11] That candidate would have been defeated even if he had received 100% of the black vote.[11] Thus, black voters have never had an opportunity to elect a black representative, despite their manifest preference for those black candidates that have presented themselves.[11] Six futile

elections is enough. Appellants' evidence was sufficient as a matter of law to establish that white voting in Liberty County is racially polarized to the extent that blacks are unable to elect the candidates of their choice.[11]

In conclusion, the district court erred in failing correctly to apply the Gingles test. Having reviewed the uncontroverted evidence below, I conclude that appellants have met all three Gingles requirements. This is all the Supreme Court requires, and I may require no more.

FOOTNOTES

1/

This issue has occasioned a great deal of scholarly comment. See, e.g., McDonald, The Quiet Revolution in Minority Voting Rights, 42 Vand. L. Rev. 1249 (1989); Abrams, "Raising Politics up": Minority Political Participation and Section 2 of the Voting Rights Act, 63 N.Y.U. L. Rev. 449 (1988).

2/

Section 2, as amended, provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f) (2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one

circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(B).

3/ Chief Judge Tjoflat argues that even if a plaintiff proves the three Gingles factors, the defendant may defeat the plaintiff's claim by demonstrating that the community is not driven by racial bias. Chief Judge Tjoflat has canvassed the pertinent cases and legislative history and provided his view of how § 2, as amended, should be interpreted. The Supreme Court also had the benefit of the prior cases and the legislative history, however, and in our view interpreted section two to remove the intent and bias considerations that Congress objected to in Bolden. Chief Judge Tjoflat cites White v. Regester for the proposition that the Court "expressly retained the requirement, under the fourteenth amendment, of proving invidious discrimination." The Court glossed invidious use, in the context of multi-member districts, stating that to sustain such a claim the plaintiff has the burden of producing evidence "to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question -- that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 766, 93 S.Ct. at 2339.

Permitting a defendant the affirmative defense of showing the absence

of community racial bias would involve litigating the issue of whether or not the community as a whole was motivated by racism, a divisive inquiry that Congress sought to avoid by instituting the results test. The committee quoted the testimony it found persuasive that such an inquiry "can only be divisive, threatening to destroy any existing racial progress in a community." S. Rep. at 36.

Chief Judge Tjoflat's analysis takes a tack similar to that of Justice O'Connor's concurring opinion in Gingles. It bears noting that her opinion clearly posed the alternative now urged by Chief Judge Tjoflat, yet failed to obtain the support of a majority of the Court.

The "results" test as developed in Gingles requires the showing of racial bloc voting. Although I do not believe that amended § 2 introduced the concept of racial bias, I note that divisions on racial lines, as exemplified in voting patterns, is striking evidence of a racially divided community, and, I submit, a fairly persuasive indicator of a community driven by racial bias.

While Gingles made clear that proof of the three core factors can be sufficient to establish a § 2 vote dilution claim, plaintiffs in this case also adduced strong evidence establishing the other supportive factors. On the totality of the evidence in the instant record, plaintiffs have clearly established their claim.

4/ The district court did not have the benefit of the Carrollton decision when it issued its ruling.

5/ The Gingles test applies to those vote dilution cases in which the plaintiff relies solely on the disparate impact of an election scheme to establish a violation of the Voting Rights Act. In cases where a plaintiff can show that an electoral scheme was purposefully adopted to weaken a minority group's political influence, a less stringent test of discriminatory impact would presumably apply.

6/ In concluding that the Gingles test has been met as a matter of law, I am mindful that the ultimate determination of vote dilution is a question of fact to be resolved under the totality of the circumstances. Gingles, 478 U.S. at 79, 106 S.Ct. at 2781. An appellate court may not set aside a finding of fact unless it is clearly erroneous, giving due regard to the district court's opportunity to judge the credibility of witnesses. Fed. R. Civ. P. 52(a). However, as the Supreme Court noted in Gingles, Congress provided legal standards which a court must apply to the facts in order to determine whether § 2 has been violated. 478 U.S. at 79, 106 S.Ct. at 2781. In reviewing the trial court's application of those standards, appellate courts are not limited by the clearly erroneous standard of review. "Rule 52(a) 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." Id. (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501, 104 S. Ct. 1949, 1969, 80 L.Ed.2d 502 (1984)).

The three Gingles requirements present mixed questions of law and fact. Initially, the district court must make findings of fact concerning the polity's demographics and actual voting patterns in particular elections. the subsequent determination of the legal inferences to be drawn from those facts, however, involve questions of law and the application of legal standards. See Gingles, 478 U.S. at 55-58, 106 S.Ct. at 2768-2770 (discussing the standards for "legally significant" racial bloc voting); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2589 (1971).

Here, the appellants presented uncontested statistical evidence that went to the heart of each of the three Gingles requirements. Although the district court raised its own objections to the statistical evidence, these concerns were not based on an evaluation of competing testimony or other evidence in the record. The district court simply found that the evidence was "statistically significant" but not "legally significant." Slip op. at 6. Almost by definition, this conclusion involves questions of law and must be reviewed de novo.

Seemingly as an afterthought, the district court also found that the statistical evidence could not be relied on to reflect real voting behavior in Liberty County. Slip op. at 12. This finding is not supported by the evidence and appears to contradict the court's earlier conclusion that the evidence was statistically significant. Having reviewed the record and the district court's criticisms, I concluded that

rejection of appellants' statistical evidence was clearly erroneous.

7/ This holding should not be read to imply an opposite result where blacks do not constitute an outright majority of the voting age population in any district. So long as the potential exists that a minority group could elect its own representative in spite of racially polarized voting, that group has standing to raise a vote dilution challenge under the Voting Rights Act. Gingles, 478 U.S. at 50 n.17, 106 S.Ct. at 2766. In some cases, blacks may constitute a majority of the overall population and may be expected to comprise a majority of the voting age population in the near future. In other cases, blacks may be so close to fifty percent that they would have a realistic chance of electing a representative. Finally, it may be that the addition of only one or two representatives to the deliberative body would make it possible for a minority group to attain a voice. The present case does not involve these more difficult situations, however, and so I leave their consideration for another time.

8/ Professor St. Angelo's results are summarized in the following table. There is reason to believe that elections 2 and 3 below are poor indicators of black political cohesiveness, since the district court found that the white establishment in Liberty County backed Earl Jennings' 1980 school board candidacy.

ELECTIONS INVOLVING BLACK CANDIDATES FOR COUNTY OFFICE

Election	Estimated Percentage Vote Received from White Voters	Resulting Percentage Vote Received from Black Voters
1. May 7, 1968 School Board (1st Primary) Charles Berrium	2.8%	100.0%
2. September 9, 1980 School Board (1st primary) Earl Jennings	17.0%	44.7%
3. October 7, 1980 School Board (Primary Runoff) Earl Jennings	40.5%	64.7%

Election	Estimated Percentage Vote Received from White Voters	Resulting Percentage Vote Received from Black Voters
4. September 4, 1984 County Commission (1st Primary) Gregory Solomon	18.8%	74.7%
5. October 2, 1984 School Board (1st Primary) Earl Jennings	32.9%	90.0%
6. September 4, 1984 School Board (1st Primary) Earl Jennings	14.5%	78.2%

9/ Regression analyses produce a number known as an "r" coefficient which expresses the degree of correlation between two variables. The "r" values range from 0, which indicates no relationship, to 1 which indicates a perfectly consistent relationship. Values above 0.3 may be considered statistically significant, while values above 0.8 reflect an exceptionally strong correlation. Professor St. Angelo's findings are set forth in the table below.

ELECTIONS INVOLVING BLACK CANDIDATES

FOR COUNTY OFFICE

Election	(Percent Vote Received by Identified Candidates Per Precinct/ Percent Black Voters Per Precinct)
1. May 7, 1968 School Board (1st Primary) Charles Berrium	.996
2. September 9, 1980 School Board (1st Primary) Earl Jennings	.578
3. October 7, 1980 School Board (Primary Runoff) Earl Jennings	.280

Election	(Percent Vote Received by Identified Candidates Per Precinct/ Percent Black Voters Per Precinct)
4. September 4, 1984 County Commission (1st Primary) Gregory Solomon	.989
5. October 2, 1984 County Commission (Primary Runoff) Gregory solomon	.962
6. September 4, 1984 School Board (1st Primary) Earl Jennings	.919

ELECTIONS INVOLVING BLACK CANDIDATES FOR COUNTY OFFICE

7. September 1970 U.S. Senate Democratic Primary Hastings	.917
8. March 1972 President Democratic Primary Chisholm	.998
9. March 1984 President Democratic Primary Jackson	.983

ELECTIONS INVOLVING RACIAL ISSUES OR THEMES

Election	(Percent Vote Received by Identified Candidates Per Precinct/ Percent Black Voters Per Precinct)
10. November 1968 President Democratic Primary Humphrey (vs. Nixon and Wallace)	.972
11. November 1970 Governor Askew (vs. Kirk)	.847
12. March 1972 Straw Ballot In Favor of Busing	.901
13. November 1972 President McGovern (vs. Nixon)	.984
14. November 1976 President Carter (vs. Ford)	.876
15. November 1980 President Mondale (vs. Reagan)	.935

Election	(Percent Vote Received by Identified Candidates Per Precinct/ Percent Black Voters Per Precinct)
16. November 1984 President Mondale (vs. Reagan)	.961

10/

In Gingles, black support for black candidates ranged from 71% to 92% in all but 5 of 16 primary elections, and from 87% to 96% in the general elections. 478 U.S. at 59, 106 S.Ct. at 2770.

11/

See the column in note 8, supra, under the heading "Estimated Percentage Vote Received from White Voters."

12/

Although the uniform inability of black candidates to win office buttresses the plaintiffs' claim, I do not mean to suggest a finding in favor of defendants. As this court said in Carrollton,

> R]acial bloc voting does not depend on the success or defeat of a particular candidate. Under Section 2, it is the status of the candidate as the chosen representative of a particular group, not the race of the candidate that is important.

829 F.2d at 1557 (interpreting Gingles).

13/

In Gingles, white support for black candidates ranged from 8% to 50% in primary elections and from 28% to 49% in general elections. 478 U.S. at 59, 106 S.Ct. at 1771.

14/

Assuming equal voter turnout and an 89:11 ratio of white to black registered voters, that candidate could only have received 47% of the vote (.89 x 40.5% plus .11 x 100%).

15/

See supra § III.B & notes 8-9.

16/

Chief Judge Tjoflat overstates the case when he claims that my interpretation of Gingles results in a right to proportional representation. To the contrary, it provides at most the opportunity for minorities to elect representatives of their choice. Should they choose not to exercise that opportunity, they would have no further redress. That a certain group does not succeed in the electoral arena it has a fair opportunity to do so is not a problem that may be remedied under § 2.

TJOFLAT, Chief Judge, specially concurring, in which FAY, EDMONDSON, and COX, Circuit Judges, and HILL, Senior Circuit Judge, join:

I concur in the judgment of the court. I do not agree, however, with Judge Kravitch, who would hold as a matter of law that the appellants have prevailed. I adhere to the views expressed by the panel in this case, see Solomon v. Liberty County, 865 F.2d 1566 (11th Cir. 1988), vacated, 873 F.2d 248 (11th Cir 19889) (en banc), and would remand this case to the district court for further proceedings consistent with that opinion.

In her concurring opinion in Thornburg v. Gingles, 478 U.S. 30, 84, 106 S.Ct. 2752, 2784 (1986). Justice O'Connor stated that interpreting section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1982), "is not an easy task." I fully agree. Because the amendment reflects a compromise between two very different views in the congress that passed the 1982

amendment to section 2, much of that section's language seems inherently inconsistent and at times, virtually meaningless. Nevertheless, we have available to us a substantial legislative history and a Supreme Court opinion interpreting section 2 to guide our analysis. In my view, Judge Kravitch, in her special concurrence (the Kravitch concurrence), misinterprets those sources. I write to explain why I believe Judge Kravitch's position to be incorrect and what I consider to be the correct interpretation of section 2 in the vote dilution context.

The Kravitch concurrence is somewhat ambiguous on certain key issues. At times, it seems to have redefined the totality-of-the-circumstances test to include only the three, mechanical factors articulated in Gingles, see ante at 14 (Kravitch, J., especially concurring):

(1) the size and compactness of the minority population; (2) the political cohesiveness of the minority population; and (3) the voting tendencies of the white majority. Section 2, its legislative history, and Gingles itself all call for a more searching and flexible inquiry into the totality of the circumstances surrounding the voting system, and there is a very important reason for that flexibility. If Judge Kravitch is strictly limiting her inquiry to the three Gingles factors, she would create a right to proportional representation for all large, compact, and cohesive minority groups--a result explicitly forbidden by section 2.[1]

At other times, however, the Kravitch concurrence seems to say that a section 2 plaintiff does not necessarily win by proving the three Gingles factors and that the totality of the circumstances is still

relevant. See ante at 9-10 (Kravitch, J., specially concurring). With this proposition, I would agree, but I fear that Judge Kravitch has failed to articulate the standard with which she has evaluated the appellants' case. When could a section 2 plaintiff lose even though he has proven the three Gingles factors? How did Judge Kravitch decide in this case that the appellants' evidence was sufficient to require judgment in their favor as a matter of law? How may a defendant rebut a section 2 claim when the three Gingles factors have been proven? The Kravitch concurrence neglects these important questions, which I attempt to answer below.

In part I of this opinion, I review the judicial and legislative history of the 1982 amendment to section 2 in an attempt to define the balance struck by the compromise legislation that now

appears as section 2. I submit that section 2 prohibits those voting systems that have the effect of allowing a community motivated by racial bias to exclude a minority group from participation in the political process. Therefore, if a section 2 defendant can affirmatively show, under the totality of the circumstances, that the community is not motivated by racial bias in its voting, a case of vote dilution has not been made out. In part II, I examine this proposition in light of the Supreme Court's pronouncement in Gingles and show that Gingles in fact supports this interpretation of section 2. In part III, I summarize my discussion. Finally, in part IV, I explain how the case under consideration should be resolved given a proper interpretation of section 2.

I.

A. Judicial Background

Our story begins in 1965, when Congress enacted the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (hereinafter 1965 Act) (codified as amended at 42. U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)). The 1965 Act was enacted pursuant to the authority granted to Congress by section 2 of the fifteenth amendment to enforce section 1 of the amendment with appropriate legislation. The heart of the 1965 Act was found in sections 4 and 5, which (1) designated certain areas of the country where voting discrimination had been most flagrant, (2) suspended literacy and other similar tests in those areas, and (3) prohibited any changes in voting procedures in those areas without first obtaining preclearance from the Attorney General or a declaratory judgment from the United States District

Court for the District of Columbia that the new procedure "[did] not have the purpose and [would] not have the effect of denying or abridging the right to vote on account of race or color." Id. § 5, 79 Stat. at 439 (codified as amended at 42 U.S.C. § 1973c). Less controversial and, at the time, less important was section 2, which applied to the entire nation and which stated: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Id. § 2, 79 Stat. at 437 (codified as amended at 42 U.S.C. § 1973).

Sections 4 and 5 of the 1965 Act were upheld against constitutional attack in South Carolina v. Katzenbach, 383 U.S. 301, 308, 86 S.Ct. 803, 808 (1966).

Although the Court there expressed no opinion as to the constitutionality of section 2 of the 1965 Act, it did set out a test to be used in all challenges to legislation enacted pursuant to section 2 of the fifteenth amendment.

Quoting Ex parte Virginia, 100 U.S. 339 (1879), the Court stated:

> [w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Katzenbach, 383 U.S. at 327, 86 S.Ct. at 818 (quoting Ex parte Virginia, 100 U.S. at 345-46). The Court went on to hold that, while parts of the 1965 Act may have constituted "an uncommon exercise of congressional power," id. at 334, 86 S.Ct. at 822, all of the challenged sections

were appropriate within the meaning of Ex parte Virginia and the fifteenth amendment.

1. The Genesis of the Intent Test

The next chapter in the story of section 2 begins with Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858 (1971), in which the Supreme Court began its development of the intent test ultimately announced ten years later in City of Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490 (1980). Whitcomb involved a challenge to a multimember-district electoral scheme in Marion County, Indiana. Significantly, the challenge was not based on section 2 of the 1965 Act or on the fifteenth amendment, but on the fourteenth amendment. The Court noted that any scheme "conceived or operated as purposeful devices to further racial discrimination" would be struck down under the fourteenth amendment. 403 U.S. at

149, 91 S.Ct. at 1872. It found, however, that the scheme under attack had not been designed to dilute the minority vote. Id., 91 S.Ct. at 1872. The Court then shifted its focus from the intent of the county's legislators to conditions in the voting community as a whole. The Court stated that invidious discrimination could not be proved only with evidence of the minority candidates' lack of success. Instead, the Court held, the plaintiffs had to show that the minority population "had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice." Id., 91 S.Ct. at 1872. To make this showing, the plaintiffs could rely on evidence of certain objective factors, such as evidence of minorities being prohibited from registering to vote, from choosing a political party, or from being slated by

the major parties. Id. at 149-50, 91 S.Ct. at 1872.

Because much of this language was incorporated into the 1982 amendment to section 2, we should stop to consider exactly what the Court was saying. Apparently, the Court required proof of invidious discrimination to support a claim under the fourteenth amendment. But the court seemed to recognize two types of discrimination and two methods of proving it. First, the plaintiff could prove invidious discrimination with proof of the legislators' intent--the intent of either those who designed the scheme or those who maintained it. Second, the plaintiff could prove invidious discrimination with circumstantial evidence of racial bias in all levels of the voting community. Although the Court did not expressly recognize that it was talking about racial bias in two different groups, the

objective factors articulated by the Court were not relevant only to "official" discrimination; they were relevant to racial bias in the political organizations and all levels of the voting community.[1] Thus, the Court implicitly recognized that two groups were relevant to any inquiry into discrimination in the voting process: the legislators or officials responsible for designing or maintaining the procedure and the voting community as a whole.

The Supreme Court's next important voting rights case was White v. Regester, 412 U.S. 755, 93 S.Ct. 2332 (1973). As in Whitcomb, the plaintiffs in White challenged, under the fourteenth amendment, the multimember-district apportionment plan of certain counties in Texas. In defining the constitutional issue before it, the Court stated that it was required to determine whether the apportionment plan had "been invidiously

discriminatory against cognizable racial or ethnic groups in those counties." Id. at 756, 93 S.Ct. at 2335. Thus, the Court retained proof of invidious discrimination as a requirement of a successful voting rights or vote dilution case brought under the fourteenth amendment. See id. at 764, 93 S.Ct. at 2339.

The Court's opinion in White never mentioned that the plaintiffs attempted to prove invidious discrimination with proof of the legislators' subjective intent in designing or maintaining the scheme; we can reasonably assume no such attempt was made. Instead, the plaintiffs appear to have relied solely on circumstantial evidence, and it is the court's discussion of that evidence that is most relevant today.

The Court began by noting that multimember districts are not unconstitutional per se. Id. at 765, 93

S.Ct. at 2339. In a key statement, the Court then defined the essence of a vote dilution claim: "we have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups." Id. (emphasis added) (citing Whitcomb). Then, closely tracking the discussion in Whitcomb, the court held that proof of lack of minority success is not sufficient to make out a vote dilution case. With language expressly incorporated into amended section 2, the Court held that

> [t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question--that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Id. at 766, 93 S.Ct. at 2339 (citing Whitcomb).

Like the Whitcomb Court, the White Court then approved several objective factors used by the district court to determine whether the plaintiffs had met their burden of proof. First, the Court noted that the district court properly considered the history of official racial discrimination in Texas. It then approved the district court's consideration of certain rules, such as a majority vote requirement in primaries and "place" rules, that, "neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination." Id. at 766, 93 S.Ct. at 2339-40 (emphasis added). Finally, the Court noted that the district court properly took into consideration the domination of the Democratic Party by a primarily white, private organization called the Dallas committee for Responsible Government. The Supreme Court approved the district

court's consideration of the racial campaign tactics used by the Committee to defeat candidates supported by the black community. Id. at 767, 93 S.Ct. at 2340. The district court concluded that the minority population had been excluded from the political process in Texas, and, based on the objective factors found by the district court, the Supreme Court affirmed. Id., 93 S.Ct. at 2340.

What exactly did the Supreme Court do in White? One commentator has suggested that the meaning of White "can be argued interminably." See Blumstein, Defining and Proving Race Discrimination: Perspectives on the Purpose Vs. Results Approach from the Voting Rights Act, 69 Va. L. Rev. 633, 670 (1983). I am not so pessimistic. First, we know that the Court expressly retained the requirement, under the fourteenth amendment, of proving invidious discrimination. See White, 412

U.S. at 764, 93 S.Ct. at 2339. Second, White did not change the Whitcomb Court's holding that a vote-dilution challenge to a multimember-district scheme would succeed on proof of the legislators' or officials' subjective intent to enact or maintain legislation that would dilute the minority population's voting strength. See Whitcomb, 403 U.S. at 149, 91 S.Ct. at 1872. Third, we know that the "invidious discrimination" requirement can also be satisfied with proof that the minority group had less opportunity than did other residents to participate in the political process and to elect legislators of their choice, which in turn can be proven with evidence of certain objective factors. See White, 412 U.S. at 766-67, 93 S.Ct. at 2339-40.

This brings us to the question of what type of "invidious discrimination" the objective factors prove. The White

Court said that a plaintiff succeeds when he can show that the multimember districts "are being used" to dilute minority voting strength. Id. at 765, 93 S.Ct. at 2339 (emphasis added). Who did the Court think would be using the multimember districts to dilute minority voting strength? The Court also noted that certain rules, while "neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination." Id. at 766, 93 S.Ct. at 2340 (emphasis added). Whose opportunity to discriminate did those rules enhance? I submit that the Court was concerned about the interaction between the voting scheme and racial bias in all levels of the voting community. Why else would a private organization's racial campaign tactics be relevant? Why would the court consider neutral rules that enhance the opportunity to discriminate? If the court was concerned

only with public officials' bias, then it would have looked only to the motive behind enacting and maintaining those rules, not to the opportunity for discrimination that those neutral rules created.

This interpretation of White would also explain the Court's statement regarding the Mexican-American population in Bexar County that, "[b]ased on the totality of the circumstances, the District Court evolved its ultimate assessment of the multimember district, overlaid, as it was on the cultural and economic realities of the Mexican-American community in Bexar County and its relationship with the rest of the county." Id. at 769, 9 S.Ct. at 2341 (emphasis added). Professor Casper has argued this portion of the Court's opinion means that

> [m]ultimember districts . . . violate the Equal Protection Clause, not

> because they overrepresent or underrepresent pure and simple, but because they do that in a context where all stages of the electoral process have been effectively closed to identifiable classes of citizens, making the political establishment "insufficiently responsive" to (Mexican-American) interests.

Casper, Apportionment and the Right to Vote: Standards of Judicial Scrutiny, 1973 Sup. Ct. Rev. 1, 28 (emphasis added). Clearly then, the objective factors are not relevant only to the narrow issue of legislators' intent; rather, they are indicators of (1) racial bias in the political community as a whole and (2) an interaction between that bias and the challenged scheme.

To summarize, after Whitcomb and White, a plaintiff could win a voting rights case under the fourteenth amendment only by showing "invidious discrimination," and that showing could be made with evidence of either (1) the legislators' or officials' subjective

intent to enact or maintain a discriminatory voting scheme, or (2) objective factors that tend to prove that the minority group has less opportunity to participate in the political process and to elect officials of its choice. And, as I have shown, a minority group has less opportunity to participate in the political process when the voting community is driven by racial bias and the challenged scheme enhances the opportunity to express that bias.

In Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd sub nom. East Carroll Parish School Bd. v. Marshall, 424 U.S. 636, 96 S.Ct. 1083 (1976), the former Fifth circuit interpreted White and Whitcomb, adding several factors to the growing list of objective factors used to prove lack of access to the political process. Among the factors considered by the Zimmer court

were (1) the responsiveness of officials to the minority group's needs, (2) the purported state policy behind the scheme, (3) the existence of past discrimination, (4) the existence of large districts, (5) majority vote requirements, (6) anti-single-shot voting provisions, and (7) access to slating processes. Id. at 1305.

2. The Bolden Intent Test

In City of Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490 (1980), the Supreme court again addressed a challenge to a multimember-district apportionment scheme, this time brought under the fourteenth and fifteenth amendments as well as section 2 of the 1965 Act. A plurality of the Bolden Court first held that, as a matter of statutory construction, section 2 of the 1965 Act simply restated the fifteenth amendment and granted nothing in addition to those rights already granted by the

fifteenth amendment. Id. at 60-61, 100 S.Ct. at 1496. The plurality then held that "action by a State that is racially neutral on its face violates the Fifteenth Amendment [and, by implication, section 2 of the 1965 Act] only if motivated by a discriminatory purpose." Id. at 62, 100 S.Ct. at 1497.

Because the clear purpose of the 1982 amendment to section 2 was to overturn Bolden's intent test, we should be absolutely certain of what the Bolden plurality held. The plurality reviewed many cases in the process of distilling the intent test, and in each discussion, it pointed out that proof of legislative intent was the gravamen of the complaint. See id. at 62-67, 100 S.Ct. at 1497-99. At one point, the plurality stated that "[a] plaintiff must prove that the disputed plan was 'conceived or operated as [a] purposeful devic[e] to further

racial . . . discrimination.'" Id. at 66, 100 S.Ct. at 1499 (quoting Whitcomb). As I note above, this statement in Whitcomb was directed at cases in which the plaintiff attempts to prove the legislators' or officials' subjective intent in designing or maintaining the challenged scheme.

As further evidence that the plurality was requiring proof of the legislators' or officials' subjective intent, the Court held that the Zimmer factors could not provide "sufficient proof of such a purpose." Id. at 73, 100 S.Ct. at 1503. As I explain above, the Zimmer factors, or more accurately, the White-Zimmer factors, are relevant to a determination of racial bias in the voting community as a whole; thus, the Bolden plurality's holding that the White-Zimmer factors alone could not support a finding of "purpose" indicates that the Court was

requiring proof of the other form of invidious discrimination--i.e., racial bias on the part of legislators or other responsible officials. Stated succinctly, Bolden required proof of "what was in the minds of legislators who enacted or retained a voting law alleged to be discriminatory." Parker, The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard, 69 Va. L. Rev. 715, 740 (1983).

This, in fact, was the district court's understanding of the Supreme Court's holding in Bolden when the case was remanded for further factfinding. In a lengthy opinion, the district court provided a detailed examination into the motives of the legislators who were responsible for devising the City of Mobile's election scheme. See Bolden v. City of Mobile, 542 F.Supp. 1050, 1053-68 (S>D> Ala. 1982). The district court then

held that "invidious racial reasons played a substantial and significant part" in the legislators' motives for designing the at-large election scheme. Id. at 1075.

Bolden, therefore, stands for two propositions. First, it equates section 2 of the 1965 Act with the fifteenth amendment. Second, it requires, under the fifteenth amendment, that a plaintiff prove discriminatory intent on the part of the legislators who designed or maintained the voting scheme.

B. Legislative Reaction to Bolden

Most of the legal community immediately condemned the Bolden decision. See Parker, supra, at 737 & n.110. Although the opinion was criticized on many grounds, the primary concern of most commentators seems to have been the heavy burden of proof that plaintiffs proceeding under the fifteenth amendment or section 2

of the 1965 Act would have to carry. See, e.g., id. at 740-46; The Supreme Court, 1979 Term, 94 Harv. L. Rev. 75, 147 (1980). Not only would plaintiffs have to pierce the neutral statements made by legislators, but they would also have to discern the hidden intent of legislators long dead.

In 1982, several provisions of the 1965 Act were due to expire, and Congress, in response to the outcry against Bolden, took the opportunity to overturn the Bolden plurality's holding that section 2 simply restated the fifteenth amendment. While Congress could do nothing to the plurality's holding that the fifteenth amendment required proof of legislative intent, congress believed it could do something to section 2 of the 1965 Act. See S. Rep. No. 417, 97th cong., 2d Sess. 41, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 219.[1]

Thus, on April 7, 1981, a new chapter in the story of section 2 opened when several representatives introduced a bill that contained a key amendment to section 2. That bill provided as follows:

> Section 2 of the Voting Rights Act of 1965 is amendment by striking out "to deny or abridge" and inserting in lieu thereof "in a manner which results in a denial or abridgement of" and is further amended by adding at the end of the section the following sentence: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.".

H.R. 3112, 97th Cong., 1st Sess. § 2, 127 Cong. Rec. 6565 (1981). The House Judiciary Committee thought that this amendment would, without creating a right to proportional representation, effectively overturn the Bolden plurality's holding that section 2 required proof of legislative or official intent. See H.R. Rep. No. 227, 97th Cong., 1st Sess. 2 (1981). The House

Judiciary committee perceived the amendment as restoring "the pre-Bolden understanding of the proper legal standard which focuses on the result and consequences of an allegedly discriminatory voting or electoral practice rather than the intent or motivation behind it." Id. at 29-30. Thus, because the amended section would strike down schemes that "are imposed or applied in a manner which accomplishes a discriminatory result," id. at 30, the plaintiff could win under section 2 merely "by showing the discriminatory effect," id. at 29. The House Judiciary Committee then listed several objective factors, drawn from the White and Zimmer opinions, that could be used to prove the discriminatory "result" or "effect." Id. at 30. With these statements, the House Judiciary Committee introduced a most

troublesome oxymoron that I discuss below in detail: "discriminatory result."

1. The Subcommittee on the Constitution

The House of Representatives passed the bill by an overwhelming majority on October 5, 1981. H.R. 3112 was then introduced into the Senate on December 16, 1981, see 127 Cong. Rec. at 32,156, and was referred to the Subcommittee on the Constitution of the Senate Judiciary Committee. The Subcommittee did not greet the bill enthusiastically--it was not persuaded by the House Judiciary Committee's assurances that the amendment created no right to proportional representation, nor was it persuaded by the overwhelming vote in the House. See Subcomm. on the Constitution of the Senate Comm. on the Judiciary, Voting Rights Act: Report of the Subcommittee on the Constitution [hereinafter Subcommittee

Report] ("Given the environment of the House consideration of H.R. 3112, this subcommittee is not persuaded that special deference ought to be accorded the outcome of that consideration."), appended to S. Rep. No. 417, supra, at 107, 126, reprinted in 1982 U.S. Code Cong. & Admin. News 278, 298.

The Subcommittee gave several reasons for fearing that the amendment would result in proportional representation. The Subcommittee argued that the new "results test" provided no ultimate or threshold criterion with which a court could evaluate the evidence before it. Therefore, the Subcommittee believed that evidence of lack of proportional representation combined with evidence of only one objective factor would satisfy the results test; since every challenged district was bound to exhibit at least one objective factor, the results test would

"boil[] down to . . . proportional representation." See id. at 136-37, reprinted in 1982 U.S. Code Cong & Admin. News at 308-09. According to the Subcommittee, "[g]iven the lack of proportional representation, as well as the existence of a single one of the countless 'objective factors of discrimination,' the subcommittee believes not only that a prima facie case of discrimination would be established under the results test by that an irrebuttable case would be established." Id. at 137, reprinted in 1982 U.S. Code Cong. & Admin. News at 309.

In essence, the Subcommittee was looking for a bottom line to the results test: if the objective factors were required to prove only the existence of discriminatory results or effects--terms for which no logical definition could be found--then the test became a strange

tautology, and evidence of only one objective factor would be sufficient to surmount the nonexistent threshold. If, however, the results test was given a "core value," that is, if Congress admitted that the test was intended to prevent invidious discrimination in voting systems, then the defendant could overcome the plaintiff's evidence with evidence that invidious discrimination was not present. See id. at 137, reprinted in 1982 U.S. Code Cong. & Admin. News at 309.

Consequently, the Subcommittee believed that the provision in the amendment that disclaimed any right to proportional representation was meaningless since any substantial minority population that was not proportionately represented would win under the new test. Id. at 143-45, reprinted in 1982 U.S. Code Cong. & Admin. News at 315-17. In light of these concerns, the Subcommittee

recommended to the full Judiciary Committee that section 2 not be amended. See id. at 173, reprinted in 1982 U.S. Code Cong. & Admin. News at 346.

2. The Senate Judiciary Committee

It was apparent that H.R. 3112, as written, might not receive enough votes from the Judiciary Committee to be reported to the full Senate.[1] A compromise position was required--one that would overturn the Bolden decision but that definitely would not mandate proportional representation. At this point, Senator Dole proposed language, known as the Dole Compromise, that was eventually enacted as amended section 2. The new language provided as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

S. 1992, 97th Cong., 2d Sess. § 2 (1982). Thus, subsection (a) retained the language of the House bill, and subsection (b) incorporated the White-Zimmer test as the standard, or core value, of subsection (a)'s new results test.

The report issued by the full Judiciary Committee stated that the compromise language was intended to codify White, see S. Rep. No. 417, supra, at 2,

reprinted in 1982 U.S. Code Cong. & Admin. News at 179, and nothing in the report indicates that the Judiciary Committee's interpretation of White differs from my interpretation of that case, see supra at 6-10. Therefore, amended section 2 was intended to restore the invidious discrimination requirement as articulated by the Whitcomb and White Courts: a plaintiff must prove either (1) the subjective discriminatory motive of the legislators or officials, or (2) the existence of objective factors,[1] showing that the electoral scheme interacted with racial bias in the community and allowed that bias to dilute the minorities' voting strength. I turn now to an examination of the report to show that this indeed was the Committee's intent.

As I note above, after Whitcomb and White, a plaintiff could win a voting rights claim either with proof of

legislative intent or with circumstantial evidence of an interaction between racial bias in the community and the challenged scheme. The Bolden plurality accepted only the former method of establishing a voting rights claim under the fifteenth amendment or section 2 of the 1965 Act. The Judiciary Committee's report is abundantly clear that amended section 2 restored the standard under that section to the status quo ante, eliminating only the absolute requirement that plaintiffs prove a discriminatory intent on the part of the legislators or officials responsible for designing or maintaining the challenged scheme. For example, the report stated that "what motives were in an official's mind 100 years ago is of the most limited relevance." Id. at 36 (emphasis added), reprinted in 1982 U.S. Code Cong. & Admin. News at 214. It goes on to note that:

> [t]he inherent danger in exclusive reliance on proof of motivation lies not only in the difficulties of plaintiff establishing a prima facie case of discrimination, but also in the fact that the defendants can attempt to rebut that circumstantial evidence by planting a false trail of direct evidence in the form of official resolutions, sponsorship statements and other legislative history eschewing any racial motive, and advancing other governmental objectives.

Id. at 37 (emphasis added), reprinted in 1982 U.S. Code Cong. & Admin. News at 215.

The report is replete with statements such as these. See, e.g., id. at 27 (no need to prove discriminatory purpose in enacting or maintaining scheme), reprinted in 1982 U.S. Code Cong. & Admin. News at 205.[1] And, in explaining the holdings of White and Whitcomb, the Committee stated that in neither case "did the Supreme Court undertake a factual examination of the intent motivating those who designed the electoral districts at issue." Id. at

22 (emphasis added), reprinted in 1982 U.S. Code Cong. & Admin. News at 200.

In light of the Committee's express intention to overturn the Bolden legislative intent requirement, the many references to "intent," "motivation," and "purpose" throughout the report must be taken to refer to the intent, motivation, or purpose of those responsible for enacting or maintaining the challenged scheme. I submit, however, that the Committee intended to retain the invidious discrimination requirement, as articulated by Whitcomb and White and as I describe above. This means that, even if the plaintiff relies on the objective factors (or, in the report's terminology, the totality of the circumstances), those factors or circumstances, taken as a whole, must show that the voting community is driven by racial bias and that the challenged scheme allows that bias to

dilute the minority population's voting strength. The Judiciary Committee in its report supports this conclusion in three ways: (1) by incorporating the Whitcomb-White-Zimmer standard into section 2, (2) by expressly recognizing the need to prove racial bias in the community, and (3) by using the phrase "discriminatory result."

First, the Committee repeatedly stated that the amendment incorporates the pre-Bolden standard, which, of course, is the Whitcomb-White-Zimmer standard. See, e.g., id. at 16, 27-28, reprinted in 1982 U.S. Code Cong. & Admin. News at 193,

204-05. The Committee paraphrased that standard when it noted that "[p[laintiffs must either prove [legislative] intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process." Id. at 27, reprinted in 1982 U.S. Code & Admin. News at 205. The "equal access" language, which formed the basis of subsection 2(b), was drawn from Whitcomb, 403 U.S. at 149, 91 S.Ct. at 1872, and White, 412 U.S. at 766, 93 S.Ct. at 2339. As I explain above, the opportunity, or lack of opportunity, to participate in the political process was proven in Whitcomb and White with objective factors indicating that the voting scheme, "overlaid, as it was, on the cultural and economic realities of the [minority

population] and its relationship with the rest of the [voting community]" either did or did not close the political process to the minority group. See White, 412 U.S. at 769, 93 S.ct. at 2341. In other words, the objective factors show whether the voting community as a whole is driven by racial bias and whether the scheme allows that bias to operate to dilute the minority group's voting strength.

Second, the Judiciary committee explicitly recognized the need to prove this interaction between the challenged scheme and racial bias in the community. Discussing the Whitcomb-White-Zimmer test, the Committee stated that under this test, "the court[s] distinguished between situations in which racial politics play an excessive role in the electoral process, and communities in which they do not." S. Rep. No. 417, supra, at 33 (emphasis added), reprinted in 1982 U.S.

Code Cong. & Admin. News at 211. The Committee then stated that "there still are some communities in our Nation where racial politics do dominate the electoral process. In the context of <u>such racial bloc voting, and other factors,</u> a particular election method can deny minority voters equal opportunity to participate meaningfully in elections." <u>Id.</u> (emphasis added), <u>reprinted in</u> 1982 U.S. Code Cong. & Admin. News at 211. Clearly, the Committee was concerned about racial politics in the voting community and viewed the objective factors--particularly racial bloc voting--as signs of such racial bias. Furthermore, the Committee defined "opportunity to participate" in terms of the existence, or nonexistence, of racial politics in the voting community.

Third, I submit that the Committee, simply by using the troublesome phrase

"discriminatory result," see, e.g., id. at 22, 28, reprinted in 1982 U.S. Code Cong. & Admin. News at 200, 206,' expressed its intent to retain the requirement that the objective factors show an interaction between racial bias int he community and the challenged scheme. This language paraphrases subsection 2(a)'s language: "which results in a denial or abridgement of the right . . . to vote on account of race of color. Professor Blumstein has suggested that the concept of a discriminatory result is "not only anomalous but also analytically bankrupt." Blumstein, supra, at 634; see Note, Geometry and Geography: Racial Gerrymandering and the Voting Rights Act, 94 Yale L.J. 189, 190 (1984) (meaning of these words not immediately apparent). I think the phrase is significant, however, and a close examination provides important

insights into what the Committee intended the amendment to accomplish.

The idea of prohibiting discriminatory results can be better stated as follows: the scheme violates section 2 if it results in discrimination.[11] To understand this statement, consider what else the Committee could have said. It could have said: the scheme violates section 2 if it resulted <u>from</u> discrimination. This, of course, is the <u>Bolden</u> test rejected by the Committee. Or, it could have said: the scheme violates section 2 if it results in <u>disproportionate</u> outcomes. Such a test would have required inquiry only into numbers and geography, creating a right to proportional representation. This the Committee also forcefully rejected. Instead, the Committee intended to prohibit schemes that result in <u>discrimination</u>.

The term "discrimination" is not meaningless. The dictionary defines the term rather broadly as "the making or perceiving of a distinction or difference." Webster's Third New International Dictionary 648 (1961). In the context of the Civil War amendments and statutes enacted to enforce those amendments, the term historically has carried a much narrower definition: a classification, decision, or practice that depends on race or ethnic origin. See Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv, L. Rev. 1, 1 (1976); see also Washington v. Davis, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047 (1976); Strauder v. West Virginia, 100 U.S. 303, 306 (1879). Thus, the Committee's desire to prohibit discriminatory results can be expressed as an intent to prohibit schemes that result in classifications, decisions, or

practices that depend on race or origin. Yet a scheme results in such classifications, decisions, or practices only when there is a conjunction in the political process of two things: (1) a voting scheme or process that allows racial bias to be expressed and (2) racial bias in the voting community. If only the suspect scheme is present, without bias in the community, the scheme cannot, by definition, result in classifications, decisions, or practices based on race or color. Similarly if only the bias is present, but the scheme does not allow that bias to be expressed or to work to dilute the minority voting strength, then there is simply no reason for the voting community to make classifications, decisions, or practices based on race or color.

We can see, then, by expanding the frequently used phrase "discriminatory

result," that the Committee must have intended to prohibit those schemes that result in discrimination; that is, those schemes that work in conjunction with racial bias in the community to allow classifications or decisions based on race or color to dilute the minority group's voting strength, thereby denying that group meaningful access to the political process. As one student commentator, interpreting the phrase "discriminatory results," has argued, "Congress . . . revised section 2 to prohibit election practices that accommodate or amplify the effect that private discrimination has in the voting process." Recent Development, Section 2 of the Voting Rights Act: An Approach to the Results Test, 39 Vand. L. Rev. 139, 172 (1986). To reiterate, "discriminatory result," or "effect," implies the existence of two things: a suspect scheme and racial bias in the

voting community. If the phrase means anything less, then it truly is "analytically bankrupt."

3. Meaning of the Legislative History

Prior to Bolden, in order to win a voting rights case, a plaintiff had to prove invidious discrimination. This could be done one of two ways. First, the plaintiff could offer proof of the legislators' or officials' subjective discriminatory intent in designing or maintaining the challenged scheme. Second, the plaintiff could offer evidence of objective factors that showed an interaction between the challenged scheme and racial bias in the community. The Bolden plurality held that the plaintiff could win under section 2 and the fifteenth amendment only with the first type of proof. The legislative history indicates that section 2 was intended only to overturn the Bolden plurality's holding

with respect to section 2 and to return voting rights cases under that section to the status quo ante. See Armour v. Ohio, 895 F.2d 1078, 1083 (6th Cir. 1990); Whitfield v. Democratic Party, 890 F.2d 1423, 1429 (8th Cir. 1989). Thus, the invidious discrimination requirement, as well as the two methods of proving it, remained part of section 2.

II. Thornburg v. Gingles

The Supreme Court's first, and to date only, opportunity to consider amended section 2 came in 1986 in the case of Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752 (1986). Gingles involved a challenged under section 2 to certain multimember districts in North Carolina. The Court made many important points in Gingles, but the most significant holding to emerge from the opinion is the three-part test discussed by Judge Kravitch

today, ante at 7-12. Looking at the objective factors articulated by the Senate Judiciary Committee report, the Court held that "some Senate Report factors are more important to multimember-district vote dilution claims than others." Gingles, 478 U.S. at 48 n.15, 106 S.Ct. at 2765 n.15. The Court then held that three objective factors must be present to make out a claim of vote dilution caused by a multimember-district scheme: (1) the minority group must be sufficiently large and compact to constitute a majority in a single-member district; (2) the minority group must be politically cohesive; and (3) the white majority group must vote sufficiently as a block normally to defeat the minority group's choice of candidates. Id. at 50-51, 106 C.Ct. at 2766-67. In a footnote, the Court stated that if these three factors are present, then the other

objective factors normally included in the totality-of-the-circumstance test, "are supportive of, but not essential to, a minority voter's claim." Id. at 48 n.15, 106 S.Ct. at 2765 n.15.

Initially, this rather mechanical interpretation of section 2 appears to be directly contrary to the Senate Judiciary Committee's intent that the totality-of-the-circumstances test be a flexible one. Judge Kravitch today, in fact, seems to read the Gingles opinion as articulating a completely mechanical test: if plaintiff shows X, Y, and Z, then plaintiff must win. If that is Judge Kravitch's position, then she misreads Gingles and significantly departs from the intent of Congress in enacting amended section 2. Before examining Gringles in more detail, I return briefly to the debate over section 2 in the Senate and its Judiciary Committee.

As I noted earlier, the primary objection in the Subcommittee on the Constitution to the House bill was the perceived lack of a threshold requirement to the results test. Without such a requirement, the Subcommittee members feared, a plaintiff could mechanically prove one objective factor and win under the new language, not leaving the defendant any opportunity to rebut the plaintiff's case. See Subcommittee Report, supra, at 137, reprinted in 1982 U.S. Code Cong. & Admin. News at 309. By allowing the plaintiff to establish an irrebuttable prima facie case with proof of only one factor, then any substantial minority population would have a de facto right to proportional representation.

To allay these fears, Senator Dole proposed language that would expressly incorporate the totality of the circumstances test. See 128 Cong. Rec. at

14,132 (remarks of Sen. Dole). The Judiciary Committee report clearly stated that this was not a mechanical test and that it did not require "that any particular number of factors be proved, or that a majority of them point one way or the other." S. Rep. No. 417, supra, at 29, reprinted in 1982 U.S. Code Cong. & Admin. News at 207. Obviously, the Committee's intended test would not allow a plaintiff to establish an irrebuttable prima facie case with proof of only one factor.

The Senators certainly intended the test to allow plaintiffs to proffer their evidence of the objective factors and to allow defendants to proffer their evidence in rebuttal. See, e.g., Id. at 29 n.116, reprinted in 1982 U.S. Code. Cong. & Admin. News at 207 n.116 ("[D]efendants' proof of some responsiveness would not

negate plaintiff's showing by other, more objective factors. . . . However, should plaintiff choose to offer evidence of unresponsiveness, then the defendant could offer rebuttal evidence of its responsiveness." (emphasis added)); 128 cong. Rec. at 13,673 (remarks of Sen. Heflin) ("The Dole compromise takes into consideration all circumstances both pro and con . . . ." (emphasis added)). Not to allow a defendant to rebut a plaintiff's proof of objective factors would simply be inconsistent with the spirit of compromise surrounding the Dole language--it would be inconsistent with the intent of the sponsors of the Dole compromise to allay the Subcommittee members' fears that a plaintiff could establish an irrebuttable case with proof of only one objective factor.

The only question remaining is what the Senators intended to require a

defendant to prove in order to rebut a plaintiff's case." I think that my discussion of the meaning of incorporating the Whitcomb-White-Zimmer test into section 2 demonstrates that the Senators would allow a defendant to rebut successfully a plaintiff's case with affirmative proof of the absence of invidious discrimination in the political process. This means that when a plaintiff relies on White-Zimmer objective factors to prove lack of meaningful access to the political process, the defendant can succeed in rebutting the plaintiff with evidence of objective factors proving the absence of an interaction between racial bias in a community and a scheme that allows the bias to dilute the voting strength of the minority group.

The Judiciary Committee addressed this point in its report. The Committee said that

> [t]he results test makes no assumptions one way or the other about the role of racial political considerations in a particular community. If plaintiffs assert that they are denied fair access to the political process, in part, because of the racial bloc voting context within which the challenged system works, they would have to prove it.

S. Rep. No. 417, supra, at 34 (first emphasis in original, second added), reprinted in 1982 U.S. code. Cong. & Admin. News at 212. The Committee tells us two things in this rather oblique statement. First, it defines fair access to the political process in terms of the existence or nonexistence of racial bias in the voting community. Second, it says that proof of bloc voting does not mechanically make the plaintiff a winner--the court must be satisfied that racial bias plays a major role in the voting community (i.e., that fair access is denied). If the defendant can

affirmatively prove, under the totality of the circumstances, that racial bias does not play a major role in the political community, and the plaintiff cannot overcome that proof, then obviously the Committee did not intend the plaintiff to win, <u>even if the plaintiff has proven bloc voting</u>.

With this background in mind, we are ready to tackle <u>Gingles</u>. <u>Gingles</u> did not address cases in which plaintiffs attempt to prove the intent of legislators or officials who designed or maintained the challenged scheme; instead it focused on cases in which plaintiffs rely on proof of objective factors. The Court first restated the two requirements of the totality-of-the-circumstances (or, objective factors) test: (1) the existence of a suspect scheme, and (2) the existence of racial bias in the community. The Court said, "[t]he essence of a § 2

claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Gingles, 478 U.S. at 47, 106 S.Ct. at 2764 (emphasis added).

The Court then discussed the three factors required to state a claim of vote dilution by a scheme of multimember districts: (1) large and compact minority group; (2) politically cohesive minority group; and (3) bloc-voting white majority. The conjunction of these three factors, according to the Court, is a "precondition[]" to vote dilution by the challenged scheme. Id. at 50, 106 S.Ct. at 2766. If the plaintiff cannot prove those factors, he cannot prove his claim. Id. at 48 & n.15, 106 S.Ct. at 2765 & n.15. The Court purported to apply the totality-

of-the-circumstances test, see Id. at 46, 106 S.Ct. at 2764, and it approved the district court's "careful consider[ation of] the totality of the circumstances," see Id. 80, 106 S.Ct. at 2781. The Court, however, also held that a plaintiff could win with proof of only these three factors; proof of other factors would not be necessary. Id. at n.15, 106 S.Ct. at 2765 n.15.

It is not immediately apparent how this gloss on the totality-of-the-circumstances test is consistent with the Judiciary Committee's mandate that "[t]he failure of plaintiff to establish any particular factor[,] is not rebuttal evidence of non-dilution," see S. rep. No. 417 (emphasis added), supra, at 29 n.118, and that courts not engage in 'factor counting," see Id. at 35, reprinted in 1982 U.S. Code Cong. & Admin. News at 212. Indeed, Judge Kravitch's occasionally

rigid interpretation of Gingles--which at times seems to treat the three Gingles factors as both necessary and always sufficient elements of a vote dilution claim--flies in the face of the Committee's mandate.

The Gingles Court did not say that a plaintiff who proves the three factors will invariable win; it said that the three factors are prerequisites to a successful claim and that they are the 'most important' of the factors and are sufficient to make out a claim. Gingles, 478 U.S. at 48 n.15, 106 S.Ct. at 2765 n.15. But the Court never said that the defendant could not rebut the plaintiff's claim. If the Court meant to deny the defendant an opportunity to rebut the plaintiff's case after the plaintiff has offered evidence of the three factors, then the three factors would be both necessary and always sufficient to win

under section 2. Such a holding would reject the clear mandate of section 2's language and the Senate Judiciary Committee's report. Moreover, such a holding would render nonsensical the Court's discussion of the totality of the circumstances after it had noted the plaintiff's success in proving the three factors, see Id. at 80, 106 S.Ct. at 2781. The Court's adherence to the totality-of-the-circumstances test must mean that the defendant can rebut the plaintiff's claim--even after the plaintiff has offered proof of the three Gingles factors.

In summary, Gingles stands for the following propositions:

1. If the plaintiff cannot prove (1) the existence of a large and compact minority group, (2) that the group is politically cohesive, and (3) that the white majority typically votes as a block,

he cannot make out a claim under section 2.

2. If the plaintiff does prove these three factors, and the defendant offers nothing in rebuttal, the plaintiff wins.

3. If the plaintiff proves the three factors and the defendant offers proof of other objective factors in rebuttal, the court must be satisfied, before it may rule in favor of the plaintiff, that, under the totality of the circumstances, the minority group is denied meaningful access to the political process "on account of race or color." If the defendant can affirmatively show that the "social and historical conditions" are such that their interaction with the scheme will not result in voting discrimination, see Id. at 47, 106 S.Ct. at 2764, the plaintiff cannot prevail. See S. rep. No. 417, supra, at 34, reprinted in 1982 U.S. Code Cong. & Admin. News at

212. Such an affirmative showing can be made with evidence of objective factors that, under the totality of the circumstances, indicate that the voting community is not driven by racial bias."

III. Pulling It All together

The foregoing discussion shows, if nothing else, that the story of section 2 is long, complex, and full of traps for the unwary. One commentator has said that amended section 2 "means all things to all parties [and therefore] means nothing at all." See 128 Cong. Rec. 14,131 (1982) (remarks of Sen. East) (quoting Wall Street Journal editorial). Although there is some truth to that statement, I believe that enough judicial and legislative history is available to make sense of amended section 2.

After extensively reviewing the language of section 2, the judicial and

legislative background of that section, and the Supreme Court's opinion in Gingles, I am convinced that a plaintiff must still prove invidious discrimination in order to succeed under section 2. The plaintiff may prove such discrimination by adducing evidence of either (1) the discriminatory intent of the legislators or officials responsible for designing or maintaining the scheme or (2) objective factors that, under the totality of the circumstances, show the exclusion of the minority group from meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting scheme. Finally, while plaintiffs who satisfy the three Gingles factors make out claims under section 2, courts must resort to the totality-of-the-circumstances analysis when the defendant offers evidence of objective factors in

rebuttal. As the Judiciary Committee stated, the "ultimate issue to be decided [must be] whether the political processes were equally open." See S. Rep. No. 417, supra, at 35, reprinted in 1982 U.S. Code Cong. & Admin. News at 213. Judge Kravitch, in her special concurrence today, however, might be treating the three Gingles factors as the ultimate issues to be decided."

The concepts of guaranteeing access to the political process and guaranteeing representation in proportion to a minority group's percentage of the population are quite distinct. To guarantee the former and not the latter, however, courts must develop a burden of proof for section 2 plaintiffs that is neither too heavy nor too light, and the line between the proper burden and a burden that is neither too heavy nor too light becomes faint at times. Clearly, Congress' attempt to

articulate the correct burden of proof rules out Bolden's intent test, and I have not attempted in this opinion to resurrect that standard. Depending upon how one interprets Judge Kravitch's special concurrence, its proposed burden of proof either goes too far in the other direction or is left largely undefined.

I submit that the burden of proof proposed herein is "just right." It does not raise insurmountable hurdles for section 2 plaintiffs; rather it allows a defendant to rebut a plaintiff's claim when the political processes are not closed to the minority group. Thus, it guarantees equal access to the political processes but does not create a right to proportional representation.

IV.

Judge Kravitch would hold as a matter of law that the appellants have succeeded

in their claim under Gingles and section 2. Such a holding would leave the district court with only one task: to fashion an appropriate remedy. As the foregoing discussion has shown, however, Judge Kravitch either (1) incorrectly treats the three Gingles factors as the necessary and sufficient elements of a section 2 vote dilution claim or (2) fails to articulate how appellants have won under the more flexible totality-of-the-circumstances test. Although proof of the three Gingles factors might be sufficient to succeed on a vote dilution claim, the district court still must make its ultimate determination based on the totality of the circumstances, the appellees can show that the voting communities were not driven by racial bias, then the appellants cannot prevail.

Writing for the panel in this case, I noted that the appellants have adduced

sufficient evidence to prove that the minority group was large, compact, and politically cohesive and that the voting communities' voting patterns were racially polarized. See Solomon v. Liberty County, 865 F.2d 1566, 1574, 1579-81 (11th Cir. 1988). I therefore agree with Judge Kravitch's conclusion that the appellants have proven these factors. The panel held, however, that the district court's findings of fact were inadequate on several points, making a final determination in light of the totality of the circumstances impossible.[14] The panel therefore remanded the case to the district court with instructions to make additional findings of fact. I submit that the panel's disposition of this case was proper and therefore disagree with Judge Kravitch's conclusion that, as a matter of law, the appellants have prevailed.

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1. Section 2 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f) (2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section established a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

2. See infra note 13 (discussing why Judge Kravitch's approach results in proportional representation).

3. Cf. Zimmer v. McKeithen, 485 F.2d 1297, 1305 n.20 (5th Cir. 1973) (The Whitcomb Court's focus "on the access of minorities to slating procedures in Marion County, Indiana, makes clear that the standards we enunciate today are applicable whether it is a specific law or a custom or practice which causes the diminution of minority voting strength."), aff'd sub nom. East Carroll Parrish School Bd. v. Marshall, 424 U.S. 636, 96 S.Ct. 1983 (1976).

4. See also 128 Cong. Rec. 14,115 (1982) (remarks of Sen. Mathias) (amendment to section 2 not an attempt to overrule Supreme Court's interpretation of Constitution).

5. See 128 Cong. Rec. at 14,132 (remarks of Sen. Dole).

6. See also 128 Cong. Rec. at 14,132 (remarks of Sen. Dole) ("the new subsection codifies the legal standard articulated in White against Regester"); id. at 14,157 (remarks of Sen. Kennedy) ("We have indicated that [the proper legal standard] is the White against Regester test.").

7. The Committee report enumerated nine relevant factors:

> 1. history of official discrimination,
> 2. racially polarized voting,
> 3. use of large districts, majority vote requirements, anti-single shot provisions, or other schemes that

enhance the opportunity for discrimination,

4. denial of minority group's access to slating process,

5. lingering effects of past discrimination,

6. use of racial appeals in political campaigns,

7. extent to which members of the minority group have been elected to public office,

8. lack of responsiveness on the part of elected officials to the minority group's needs, and

9. whether the purported state policy underlying the scheme is tenuous.

See S. Rep. No. 417, supra, at 28-29, reprinted in 1982 U.S. Code Cong. & Admin. News at 206-07.

The Committee noted that this was not intended to be an exclusive list and that 'there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." See id. at 29, reprinted in 1982 U.S. Code Cong. & Admin. News at 207.

8. See also 128 Cong. Rec. at 13,673 (remarks of Sen. Specter) (proving subjective intent of legislature too difficult); id. at 14,113 (remarks of Sen. Mathias) (Bolden test requires inquiry into motives of "public officials" or "lawmakers").

9. See also H.R. Rep. No. 227, supra, at 28, 29.

10. In fact, the idea was expressed this way several times. See, e.g., S. Rep. No. 417, supra, at 2 (section 2 prohibits any

"voting practice, or procedure [that] results in discrimination"); 128 Cong. Rec. at 14,111 (section 2 prohibits "any voting practice or procedure which results in voting discrimination") (remarks of Sen. Mathias, a co-sponsor of the amendment).

11. If, indeed, Judge Kravitch today would hold that proof of the three Gingles factors is not always sufficient to prevail on a section 2 claim, then this is an important question that she fails to answer.

12. I do not mean to imply that a defendant, by providing absence of racial bias, can rebut a plaintiff's showing of racial bloc voting. The Gingles Court expressly held that proof of a correlation between the race of voters and the selection of candidates raises an irrebuttable case of vote dilution-however, it is irrebuttable proof of only one factor (albeit an important factor) in the totality-of-the-circumstances test.

13. If this is Judge Kravitch's interpretation of section 2, and if this interpretation is correct, then Congress has done something it most definitely did not intend to do--enact a right to proportional representation. If all a plaintiff must ever do is prove the three Gingles factors, than all large, compact, and politically cohesive minority groups will have a de facto right to proportional representation. Whenever minority candidates are not succeeding in at-large elections, and whenever the minority is large and politically cohesive, the only explanation for the minority candidates' lack of success would be white bloc voting.

Assume, for example, that a county has a population of 100 people; 70 white and 30 minority. Assume further that the county commission has one vacant seat and that one white candidate and one minority candidate are running for the seat. The minority population votes while the white candidate receives only 10 of those votes. In order to win, the white candidate must receive 41 of the 70 white votes, or 59% of the white votes. I submit that if this pattern continued over several elections, most courts would find the pattern to be strong evidence of white bloc voting. See Gingles, 478 U.S. at 53 n.21, 106 S.Ct. at 2768 n.21 (bloc voting occurs when "black voters and white voters vote differently"). When the minority group is large and cohesive, and when the minority candidates consistently fail, the white majority must be bloc voting.

Therefore, the three Gingles factors collapse into two factors: (1) Is the minority group large and compact, and (2) is it politically cohesive? If Judge Kravitch's rigid interpretation of Gingles is correct, then a plaintiff who proves these two factors must always win, which means simply that large, compact and cohesive minority groups will possess a de facto right to proportional representation.

While Congress, under the fifteenth amendment, may prohibit certain practices not prohibited by section 1 of the fifteenth amendment, see City of Rome v. United States, 446 U.S. 156, 173, 100 S.Ct. 1548, 1559 (1980), it may do so only with appropriate legislation, see id. at 175, 100 S.Ct. at 1560 (quoting Ex parte Virginia, 100 U.S. 339, 345-46 (1879)). The Court in City of Rome approved only

the preclearance provisions of section 5 of the Voting Rights Act, see supra at 3; it said nothing about abolishing section 2's invidious discrimination requirement or about enacting a right to proportional representation. In fact, the Court held that the preclearance provision was appropriate only because "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact." Id. at 177, 100 S.Ct. at 1562 (emphasis added) (footnote omitted).

There has never been any suggestion that legislation granting a right to proportional representation is an appropriate means of enforcing the fifteenth amendment. Cf. The Federalist No. 35, at 219-20 (A. Hamilton) (J. Cooke ed. 1961) (proportional representation of "each class" is neither feasible nor desirable). Congress clearly disavowed such a purpose, and I presume that Judge Kravitch would not find such legislation appropriate. Yet, her interpretation of section 2 creates such a right for large, compact, and cohesive minority groups, and such an interpretation makes section 2 plainly inappropriate under City of Rome and Ex parte Virginia.

14. Specifically, the panel held that the district court's findings of fact were inadequate with regard to (1) whether minorities were excluded from candidate slating processes, (2) whether racial appeals were made during campaigns, (3) whether the elected officials were responsive to the particular needs of the

minority communities, and (4) whether the state's policy behind the challenged electoral system was tenuous. See Solomon v. Liberty County, 865 F.2d 1566, 1581-83 (11th Cir. 1988).

HILL, Senior Circuit Judge:

I concur in the opinion of Chief Judge Tjoflat.

By writing separately, I take no issue with what he has said. In one or two respects, I might approach the subject from a different point of view. It may well not be a better point of view -- just one that ought not be overlooked.

Chief Judge Tjoflat has given us the legislative and decisional history of the Voting Rights Act. The Fifteenth Amendment is constitutional; the Voting Rights Act is statutory. Nevertheless as judicial decisions are followed by legislative amendments, their meanings are to be ascertained, in the common law tradition, by inspecting, at each step, what has gone on before and what is accomplished by the step investigated. Chief Judge Tjoflat's opinion is, thus, a

significant piece of work in the common law method.

This comes to us from the enactment and promulgation point of view. We understand what the people meant who adopted the Fifteenth Amendment, what the congress did when it passed legislation to implement it; what was held by the judicial branch interpreting the legislation and, therefore, what the legislative branch undertook to do when it amended its earlier work to correct what is perceived its shortcomings to have been as interpreted by the Court.

The history of the Voting Rights Act is also interesting when one reviews its history from the point of view of the effect it has had on government and those who govern.

In a democracy, elected office holders tend to advance the interests of their electorate.[4] They have no political

motivation or pressure to represent other members of the population within their state, district, county or etc. The office holder's official fate is in the hands of those who vote and they can -- and, historically do --demand responsiveness.[11]

From shortly after the end of Reconstruction until the enactment of (and enforcement of) the Voting Rights Act, the electorate in large parts of the country was made up of white people. Faithfully, office holders represented these people and exerted themselves to obtain governmental responsiveness to their wishes and needs. Governors, Senators, Congressmen, Legislators, Mayors, Councilmen, Commissioners, Sheriffs, and School Board Members had no political reason to respond to the needs of black citizens who were not a part of their electorates. Democracy, as far as it

went, worked; the people who held the franchise could greatly influence the actions of elected officials.

Democracy, though, did not go far enough. The black people, excluded from membership in the electorate, commanded no more governmental response to their needs than occasional crumbs from the white feast.

The Voting Rights Act -- and its rigid enforcement -- extended democracy by expanding the electorate of every office holder. Those who had been excluded entered into the "voting community." Because democracy works, governmental action began to change. The response of office holders remained constant; they faithfully represented their electorate. It was the electorate that changed. Governors did not have to learn to count; they merely had to realize that when they

had counted the white community, they had not finished counting!

Usually -- but not always -- the new black members of the electorate constituted a minority. There are those who conclude that office holders need not be politically responsive to a minority. An office holder who believe this was soon replaced by a candidate who was supported by the minority and received a reasonable split of the votes of the majority!

Before the enforcement of the Voting Rights Act's demand that blacks have access to the ballot and the ballot box, there were office holders who would denounce as scurrilous slander an opponent's suggestion that the office holder had attended a black gathering. A familiar political trick was to print a picture of a black church meeting, dinner or other gathering with a political opponent's picture cleverly inserted

making it appear that the opponent had attended. Since the electorate changed, those same office holders have vied for invitations to such meetings and attend to make their responsiveness to the needs of black citizens apparent.

The judiciary has embarked on a massive campaign to undo these great and good changes in our political institutions. Where there are black voters and white voters in one political system, the courts are limiting the impact of black votes so that it falls on only one or two, generally a minority, of the office holders. By gerrymandering district lines so as to encircle the black voters, blacks are prevented from being a part of the separate electorates of, usually, a majority of those to be elected. Once again, as in days before the Voting Rights Act, most office holders have political reason to respond to the

wishes and needs of white citizens and need not concern themselves with the blacks. Those who have heretofore responded to -- and been supported by -- black citizens have their support taken away, and they fall victim to the campaign of a closet segregationist who has found it politically expedient to come out of the closet.

Where, on one board, council or commission, an issue arises with racial overtones, the members with white constituencies have no political reason to seek a middle ground and those whose electorate is black are politically compelled to resist compromise -- to resist being seen as Uncle Tom. Polarization is not tempered by the new political arrangement; it is compelled by it.

In Liberty County, today, <u>every</u> county commissioner and school board

member knows that he or she has a constituency with 11% black voters. To ignore them or their wishes and needs is to present a potential challenger with 11% of the votes in hand. In any close division of white votes, that 11% could defeat the office holder.

Those who join Judge Kravitch's opinion would relieve these commissioners and board members of this concern. Judge Kravitch's opinion would make it necessary that <u>one</u> commissioner and <u>one</u> member of the school board pay attention to the citizens of the county who are black. The other majority commissioners and school board members would be, politically, the same as if the Voting Rights Act had never become law. They could still count and, once again, when they had counted the white voters they would have finished counting. Requiring the creation of a separate district for black voters would

forbid the black citizens of Liberty County from voting for or against the vast majority of office holders. The once genuine fears of "white supremacists" that blacks were going to have an impact upon elected officials would be largely allayed.

Is it necessary that such a result ever be brought about? I acknowledge that Thornburg v. Gingles, 478 U.S. 30, 84, 106 S.Ct. 2752, 2784 (1986), says that in some cases of manipulation of area-wide voting practices for racial purposes it may be necessary. I agree with Chief Judge Tjoflat that Gingles does not say that it should be done if it can be done; I read Judge Kravitch's opinion as requiring one or more separate districts into which black voters shall be confined whenever that arrangement is found feasible.

For these reasons stated in this en banc case, and those I expressed in the

panel decisions in U.S. v. Dallas County Commission, Dallas County, Alabama, 850 F.2d 1433, 1443 (11th Cir. 1988) (Hill, J. specially concurring); Edge v. Sumter County School District, 775 F.2d 1509, 1514 (11th Cir. 1985) (Hill, J. specially concurring); Lee County Branch of the NAACP v. City of Opelika, 748 F.2d 1473, 1484 (11th Cir. 1984) (Hill, J. specially concurring) and Kirksey v. Board of Supervisors of Hinds County, Miss., 554 F.2d 139, 159 (5th Cir. 1977) (Hill, J. dissenting) and for the reasons given by Chief Judge Tjoflat, I join in his opinion.

FOOTNOTES

[1] Chief Judge Tjoflat uses the expression "voting community" as distinguished from the community as a whole. I intend the word "electorate" to convey the same.

[2] I do not overlook the fact that there are and have been office holders who conscientiously seek the welfare of all, whether members of the electorate or not. Neither do I mean to ignore others who wold prefer to discriminate against substantial minorities who do vote. Our democratic form of government does not depend entirely upon the noblesse oblige of the former and it is not at the mercy of the latter.

Greg SOLOMON, et al., Plaintiffs-Appellants,

v.

LIBERTY COUNTY, FLORIDA, et al., Defendants-Appellees.

Gregory SOLOMON, et al., Plaintiffs-Appellants,

v.

LIBERTY COUNTY SCHOOL BOARD, FLORIDA, et al., Defendants-Appellees.

No. 87-3406

United States Court of Appeals,
Eleventh Circuit.

April 26, 1989.

David M. Lipman, Lipman & Weisberg, Miami, Fla. for plaintiffs-appellants.

Jack F. White, Jr., Hal A. Davis, Quincy, Fla., for defendants-appellees.

Appeals from the United States District court for the Northern District of Florida.

ON PETITION FOR REHEARING AND
SUGGESTION OF REHEARING
IN BANC

(Opinion December 12, 1988, 11th Cir., 1988, 865 F.2d 1566.)

Before RONEY, Chief Judge, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT,

ANDERSON, CLARK, EDMONDSON and COX, Circuit Judges.

BY THE COURT:

A member of this court in active service having requested a poll on the application for rehearing in banc and a majority of the judges of this court in active service having voted in favor of granting a rehearing in banc,

IT IS ORDERED that the above causes shall be reheard by this court in banc with oral argument during the week of June 5, 1989, on a date hereafter to be fixed. The clerk will specify a briefing schedule for the filing of in banc briefs. The previous panel's opinion is hereby VACATED.

(3)

90-102

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LIBERTY COUNTY, FLORIDA, ET AL,
AND
LIBERTY COUNTY SCHOOL BOARD, ET AL,
Petitioners,

versus

GREGORY SOLOMON, ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS, ELEVENTH CIRCUIT.

APPENDIX
VOLUME II

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v.

LIBERTY COUNTY, FLORIDA, et al., Defendants-Appellees.

Gregory SOLOMON, et al., Plaintiffs-Appellants,

v.

LIBERTY COUNTY SCHOOL BOARD, FLORIDA, et al., Defendants-Appellees.

Nos. 87-3406, 87-3406A.

United States Court of Appeals, Eleventh Circuit.

Dec. 12, 1988

Black citizens brought voting rights challenge to at-large election system in county. The United States District Court for the Northern District of Florida, Nos. 85-7010-MMP, 85-7009-MMP, Maurice Mitchell Paul, J., found no violation. Citizens appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) district court made inadequate factual findings on numerous issues; (2) minority voting age

population, rather than minority voter registration figures, was proper consideration for determining whether there would be single-district majority; (3) district court should have considered regression analysis expressing relationship between percentage of vote received by particular candidate and percentage of black registered voters; and (4) district court should have considered legislature's racially discriminatory reason for prescribing at-large system.

Vacated and remanded.

Hill, Circuit Judge, specially concurred.

1. Elections - 12(3)

Unless minority group can show that it is significantly underrepresented in proportion to percentage in total electorate, minority group has no challenge to voting qualification or prerequisite, even if racial prejudice and

discrimination are rampant. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

2. Elections - 12(7)

Plaintiffs seeking to establish whether minority group would achieve roughly proportional representation but for multimember electoral system must establish that minority group can constitute majority which is politically cohesive in one or more single-member districts. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

3. Elections - 12(7)

Plaintiffs in voting rights challenge to multimember election system must show that system will likely discriminate against their minority group in challenged election. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

4. Elections - 12(9)

If evidence establishes that bloc-voting whites probably will defeat bloc-

voting blacks plus white crossovers in multimember election, then court may infer that current system is driven by racial bias and that bias is likely to dominate challenged election; but if evidence clearly establishes that bloc-voting whites will not defeat bloc-voting blacks plus white crossovers, then court must infer the discriminatory effect of challenged system is not product of racial bias. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

5. Elections - 12(9)

If evidence of vote polarization and minority electoral failure is either inconclusive, insufficient, or unavailable due to lack of minority candidacies, courts must rely on full range of totality of circumstances to determine whether challenged electoral system violates Voting Rights Act. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

6. Elections - 12(3)

To establish vote dilution claim, plaintiff must prove that minority group is underrepresented in proportion to percentage of total electorate, that minority group has sufficient geographic and political cohesion to allow creation of one or more minority controlled single-member districts, that totality of circumstances, with special emphasis on both vote polarization and extent of past minority electoral successes, compels inference that current electoral system is driven by racial bias in community or political system, and that evidence also leads to conclusion that challenged system will continue to deny minorities equal access to political process. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

7. Counties - 38

Voting age population of minorities, rather than registered voting age population of minorities, was proper consideration to determine whether blacks would constitute politically cohesive majority in single-member district and whether multimember district violated Voting Rights Act. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

8. Counties - 38

Evidence that blacks were 51% of minority voting age population in one district of county with at-large elections established that blacks would constitute majority and supported voting rights challenge to at-large elections. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

9. Counties - 38

Regression analysis showing relationship between percentage of vote

received by particular candidate and percentage of black registered voters established black political cohesiveness and supported voting rights challenge to at-large election system, even though one primary election was not racially polarized; average correlations in elections involving black candidates ranged from .787 to .966. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

10. Counties - 38

District court in voting rights challenge to at-large election system could not disregard regression analysis of elections involving black candidates and showing relationship between percentage of vote received by particular candidate and percentage of black registered voters, event though one election showed no black political cohesiveness; data from elections with black candidates demonstrated extremely strong, black vote

polarization. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

11. Elections -12(9)

If small number of minority candidacies prevents compilation of statistical evidence, court should not deny relief, but should rely on other totality of circumstances factors to determine if electoral system had discriminatory effect. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

12. Counties - 38

Plaintiffs in voting rights challenge to at-large electoral system should have been able to buttress their claims of white bloc voting by pointing to racial voting patterns in state and federal elections that they did not challenge. Voting Rights Act of 1965, § 2, 42, U.S.C.A. § 1973.

13. Counties - 38

District court's inadequate findings of fact in voting rights challenge to at-large election system justified remand for more findings on history of discrimination, other potentially discriminatory voting practices, candidates slating process, overt, racial appeals to voters, responsiveness of elected officials, and state policy behind electoral systems in county. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

14. Counties - 38

District court's finding that North Florida and county with at-large election system had undisputed history of extensive official discrimination affecting rights of blacks to participate in political process was incapable of meaningful review in voting rights challenge. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

15. Counties - 38

Trial court in voting rights challenge to at-large election system in county should have considered legislature's racially discriminatory reason in 1947 to prescribe at-large system. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973; West's F.S.A. §§ 230.04-230.10, 230.105; West's F.S.A. Const. 1885, Art. 8, § 5.

16. Elections - 12(3)

White-bloc vote that normally will defeat combined strength of minority support plus white crossover vote rises to level of legally significant white-bloc voting. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

17. Counties - 38

Evidence that blacks in county plus average number of white crossover voters was 29.5% of total vote in county was legally significant evidence of white vote

polarization and supported blacks' challenge to at-large electoral system in county. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

18. Counties - 38

District court in voting rights challenge to at-large election system made inadequate finding of fact that election system possessed some features that could enhance opportunity to discriminate against blacks; court should have determined why those devices were present and how they impacted on right of blacks to participate in political process. Voting Rights Act of 1965, § 2, 42, U.S.C.A. § 1973.

19. Federal Civil Procedure - 2290

In any case in which plaintiff's claim is based on circumstantial evidence, ultimate findings of fact, in most instances, must be supported by solid basis of subsidiary findings of fact.

20. Counties - 38

Voting patterns in black candidate's election were not probative evidence of vote polarization alleged in voting rights challenge to at-large election system, if candidate was not perceived to be black candidate. Voting Rights Act of 1965, § 2, 42, U.S.C.A. § 1973.

21. Elections - 12(9)

Lingering effects of past discrimination are relevant in voting rights challenge only if they continue to hinder minority group's ability to participate effectively in political process. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

22. Counties - 38

Nonelection of blacks had minimal probative value in determining whether at-large election system was driven by racial bias and violated Voting Rights Act.

Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

23. Counties - 38

Opposition to possible remedy by some members of plaintiff class was irrelevant in weighing totality of circumstances to determine whether at-large election system violated Voting Rights Act. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

David M. Lipman, Lipman & Weisberg, Miami, Fla., for plaintiffs-appellants.

Jack F. White, Jr., Hal A. Davis, Quincy, Fla., for defendants-appellees.

Appeals from the United State District Court for the Northern District of Florida.

Before TJOFLAT and HILL, Circuit Judges, and HALL*, District Judge.

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* Honorable Robert H. Hall, U.S. District Judge for the Northern District of Georgia sitting by designation.

TJOFLAT, Circuit Judge:

I.

These consolidated cases involved challenges under section 2 of the Voting Act of 1965, 42 U.S.C. § 1973 (1982) (as amended), to the at-large method of electing the county commission and the school board of Liberty County, Florida.[1] The commission governs the county; the board operates the county's school system. Each body has five members who serve for staggered four-year terms. See Fla. Const. art. 8, § 1(e) (county commission); Fla. Stat. § 100.041(3) (1987) (school board). Candidates run for the seat on the commission or school board that bears the number of the "residence district" in which they live. See Fla. Const. art. 8, § 1(e) (county commission); Fla. Stat. § 124.01 (same); id. § 230.061 (school board). In both the primary and general elections, the entire county electorate

votes for one candidate from each residence district. See Fla. Const. art. 8, § 1(e) (county commission); Fla. Stat. § 100.041(2) (same); id. § 230.08-.10 (school board). Most candidates seek election as the nominee of a political party and therefore must first run in their party's primary election. To win party nomination, candidates must receive a majority of the countywide vote; if no candidate gets a majority of the vote, a second run-off primary is held. See id. §§ 100.061, .091 (general provisions). To be elected, candidates must receive a plurality of the vote in a countywide general election. See id. § 100.181 (general provision); id. § 230.10 (school board).

The appellants, the plaintiffs below, in these cases are four black citizens of liberty County. They allege that the at-large method of electing county

commissioners and school board members violates the Voting Rights Act because the systems deny blacks a fair opportunity to participate in the political process and to elect candidates of their choice.[4] The appellants therefore seek injunctive relief. The present electoral systems, they contend, should be disbanded and the county should be divided into five districts, each of which would elect one member to the commission and to the school board. One of these single-member districts would have a black majority, thus alleviating the discrimination of which they complain. The appellees in these cases are the Liberty County Commission, the liberty County School Board, and the members of those bodies in their official capacities. They deny that the at-large method violates the Act, as the appellants allege.

At the conclusion of a bench trial, the district court found for the appellees, observing that under the current at-large electoral system black citizens had more political influence than they would have under any single-member district scheme the court could fashion. The court therefore concluded that the evidence presented by the appellants was insufficient to demonstrate a violation of the Voting Rights Act and denied relief. These appeals followed;

II.

The Voting Rights Act was enacted in 1965 to protect the right of racial minorities to participate effectively in the political process. Section 2 of the Act, which is essentially a codification of the fifteenth amendment, provides that:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of

> the United States to vote on account of race or color.

Voting Rights Act of 1965, P.L. 89-110, § 2, 79 Stat. 437, 437.

In Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd sub nom. East Carroll Parish School Bd. v. Marshall, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed. 2d 296 (1976), our predecessor circuit developed a method of analysis to guide trial courts in determining whether an electoral system denied a minority group access to the political process on account of race when no direct evidence of discriminatory intent exists. First, the trial courts were to determine whether the plaintiffs had demonstrated that their minority group was underrepresented in proportion to its percentage of the total electorate. If the plaintiffs demonstrated such underrepresentation, the courts were then to determine whether the

underrepresentation was caused by an intent to discriminate; the courts would do so by making a number of factual inquiries. Called the "totality of circumstances" test, these inquiries included:

> 1. [Whether] any history of official discrimination in the state or political subdivision ... touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. [Whether] voting in the elections of the state or political subdivision is racially polarized;
>
> 3. [Whether] the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. [Whether] members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and

health, which hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals; and

7. [Whether] members of the minority group have been elected to public office in the jurisdiction.

Carrollton Branch of the NAACP v. Stallings, 829 F.2d 1547, 1553 (11th Cir. 1987) (summarizing the Zimmer inquiries), cert. denied, ---- U.S. ----, 108 S.Ct. 1111, 99 L.Ed.2d 272 (1988). If the findings of fact yielded by these inquiries, taken as a whole, gave rise to the inference that the electoral system's discriminatory effect was driven by racial bias in the community or its political system, the plaintiffs established a violation of the Act. The court could then remedy this violation by eliminating the challenged multimember electoral system and, in its place, establishing an appropriate number of single-member

electoral districts drawn along racial lines to assure roughly proportional minority representation.

In 1980, the Supreme Court enhanced the plaintiffs' burden of proof in vote dilution cases. See Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). In Bolden, the Court held that the Voting Rights Act required the plaintiffs to prove that the responsible government officials "conceived or operated" the challenged electoral system as a "purposeful device to further racial discrimination." Bolden, 446 U.S. at 70, 100 S.Ct. at 1501 (citing Whitcomb v. Chavis, 403 U.S. 124, 149, 91 S.Ct. 1858, 1872, 29 L.Ed.2d 363 (1971)). Thus, an inference of racial bias yielded by the seven Zimmer inquiries might not be sufficient in a given case to establish a section 2 violation.

In 1982, Congress amended the Voting Rights Act to overrule Bolden.[11] The legislative history of the 1982 amendment indicated that in addition to the Zimmer inquiries, in weighing the totality of the circumstances the courts should consider:

> [8.] [W]hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and
>
> [9.] [W]hether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. No. 417, 97th Cong., 2d Sess. 29, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 207. Following the enactment of the 1982 amendment, the courts resumed adjudicating vote dilution claims under the totality of circumstances approach. This approach, however, was again modified when, in 1986, the Supreme Court decided the case of Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

In Gingles, the Supreme Court added an important gloss to the test for vote dilution claims:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the multi-member form of the district cannot be responsible for minority voters' inability to elect its candidates. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it -- in the absence of special circumstances, such as the minority candidate running unopposed [--] usually to defeat the minority's preferred candidate. In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

Gingles, 478 U.S. at 50-51, 106 S.Ct. at 2766-67 (footnotes & citation omitted). By following the analytic framework

announced in Gingles, a trial court can answer what we believe are the four questions posed in every vote dilution case: (1) Is the minority group significantly under-represented in proportion to its percentage of the total electorate? (2) If so, could the minority group achieve roughly proportional representation but for the multimember electoral system? (3) If so, can the minority group establish that the discriminatory effect of the challenged electoral system is driven by racial bias in the community or its political system? (4) If so, can the minority group establish that such bias will continue to prevent the minority group from having equal access to the political process? By asking these questions we do not mean to imply a new test of vote dilution under section 2 of the Voting Rights Act. Rather, we simply restate the procedure a

trial court should follow in deciding a section 2 case in order to give due recognition to Congress' affirmance of the totality of circumstances test and the three elements of the Gingles gloss. We now examine these questions in turn.

[1] The first question asks whether the minority group is significantly underrepresented in proportion to its percentage of the total electorate. This question does not explicitly arise in most vote dilution cases because, as a practical matter, the minority group would not be bringing suit if it were proportionally represented. The question, however, is fundamental to section 2 jurisprudence because the Voting Rights Act exists solely to remedy inequalities in access to the political process. Thus, unless the minority group can show that it is significantly underrepresented in proportion to its percentage of the total

electorate, the minority group has no section 2 claim -- even if racial prejudice and discrimination are rampant in the challenged electoral system.

[2] Our second question asks whether the plaintiffs would be able to elect one or more representatives but for the multimember nature of the electoral system. Phrased in terms of effect rather than cause, this question asks whether the court can provide a remedy for the plaintiffs' injury if vote dilution ultimately is established. While this question was an implicit part of shaping a remedy under the totality of circumstances analysis, Gingles gives this question new prominence by making it a threshold inquiry.[11] The plaintiffs meet this requirement by producing the evidence necessary to satisfy the first two elements of the Gingles gloss. Thus, the plaintiffs must establish that the

minority group can constitute a majority (Gingles element 1) that is politically cohesive (Gingles element 2) in one or more single-member districts.[4]

[3] Our third and fourth questions both primarily rely on the body of evidence produced under the third element of the Gingles gloss. The third question asks whether the minority group can establish that the discriminatory effects of the challenged electoral system are driven by racial bias in the community or its political system. The plaintiffs in an exceptional case might be able to produce direct evidence on this point, but in the usual case the answer must be inferred from the totality of the circumstances. The fourth question builds on the third, asking whether the minority group can establish that such bias will continue to prevent the minority group from having equal access to the political

process so as to warrant injunctive relief. In other words, the plaintiffs must show that in the election they are challenging, the electoral system will likely discriminate against their minority group.[11]

[4] To answer these third and fourth questions, the trial court may have to draw upon all of the evidence produced by the nine totality of circumstances inquiries. Under Gingles, however, evidence of white bloc voting -- the second inquiry under the totality of circumstances test -- is the most probative indicator of vote dilution. If this evidence clearly establishes that whites, voting as a bloc, will probably defeat blacks voting as a bloc plus white crossovers, then the court may infer, solely from this evidence, both that the current system is driven by racial bias

and that this bias is likely to dominate the challenged election.[4]

Conversely, if the evidence clearly establishes that whites, voting as a bloc, will not defeat blacks voting as a bloc plus white crossovers, then the court must infer that the discriminatory effect of the challenged system is not the product of racial bias; the plaintiffs' case, therefore, would have to be dismissed on the merits.[4]

[5] Between these extremes, however, will fall situations in which evidence of vote polarization and minority electoral failure is either inconclusive, insufficient, or unavailable due to a lack of minority candidacies. In these cases, the courts must rely on the full range of totality of circumstances inquiries to determine whether the challenged electoral system violates the Act. The Supreme

Court recognized this in Gingles when it noted that:

> The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances. One important circumstance is the number of elections in which the minority group has sponsored candidates. Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process. Similarly, where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim.

[6] To summarize, we hold that to establish a section 2 vote dilution claim the plaintiffs must prove (1) that the minority group is underrepresented in proportion to its percentage of the total electorate, (2) that the minority group has sufficient geographic and political cohesion to allow the creation of one or more minority controlled single-member districts, (3) that the totality of

circumstances, with special emphasis on vote polarization and the extent of past minority electoral success, permits the inference that the current electoral system is driven by racial bias in the community or its political system, and (4) that this same evidence also leads to the conclusion that the challenged electoral system will continue to deny minorities equal access to the political process.

III.

In deciding these cases, the district court did not use our four-question method of analysis, nor did the court pay particular attention to the Gingles gloss. As a result, the district court made inadequate findings of fact and conclusions of law with respect to several critical issues in these cases. We are therefore unable to provide full appellate review.

Ordinarily, we would remand these cases to the district court for more complete findings of fact and a reassessment of its conclusions of law without intimating any view as to the results the district court should reach. As the following discussion indicates, however, to do so here would simply perpetuate the error that has occurred. Accordingly, we address the factual issues that were before the district court, pointing out those areas as to which the material facts are not in dispute. We also address the legal issues, with especial attention to areas in which the district court misapplied the law. Our discussion adheres to the four-question method of analysis described above.[4]

A.

The first question asks whether blacks in Liberty County are

underrepresented in proportion to their percentage of the total electorate. the undisputed evidence established that blacks comprise 11% of Liberty County's population and that a black candidate has never been elected to countywide office. Though the district court did not answer this question, the record demonstrates that appellants established underrepresentation as a matter of law.

B.

The second question asks whether blacks in Liberty County could achieve roughly proportional representation in a single-member district but for the multimember electoral system; stated another way, the question asks whether blacks in Liberty County could constitute a politically cohesive majority in a single-member district. Following the pattern laid out in Gingles, we first

examine the sufficiency of the black single-district majority, and then turn to the issue of black political cohesiveness.

The undisputed demographic evidence in this case indicates that the black population is concentrated in the northwest quadrant of Liberty County. Countywide, blacks comprise only 11% of the total population; if, however, the county were divided into five equally populous single-member districts to accommodate both the commission and school board elections, blacks might achieve a majority in one single-member district. In this district (District 1), blacks would comprise 49% of the total population, 51% of the voting age population, and 46% of the registered voting age population.[11]

[7, 8] The district court found the registered voting age population to be the determinative factor in establishing a

single-district majority under Gingles. We hold that reliance on the registered voting age population was improper. Minority voter registration figures are inherently unreliable measures in vote dilution cases because the very lack of minority political power responsible for the bringing of the section 2 action also may act to depress voter registration. Although the language of Gingles seems to refer simply to gross minority population, references in the opinion to "minority voters" show that the Court intended the sufficiency of the single-district majority to be measured by the size of the voting age population. See Gingles, 478 U.S. at 50-51 n. 17, 106 S.Ct. at 2766-67 n. 17; see also McNeil v. Springfield Park Dist., 851 F.2d 937, 944-45 (7th Cir. 1988) (holding that voting age population, not gross population, controls Gingles analysis). Although District 1's 51%

black voting age population might create only a mathematical majority, if white crossover votes are included, an effective black majority would be achieved in the district.[11] The appellants' evidence showing a 51% minority voting age population in District 1 was therefore sufficient as a matter of law to meet the majority requirement of Gingles.

[9] As noted, in addition to geographic cohesion, the appellants must demonstrate that the black community in Liberty County is politically cohesive. To meet this burden, the appellants presented statistical evidence compiled by Douglas St. Angelo, a professor of political science at Florida State University. Professor St. Angelo performed a series of regression analyses on three sets of elections involving the Liberty County electorate. These regression analyses express a relationship

between the percentage of the vote received by a particular candidate and the percentage of black registered voters. The resulting figure, called the "r" coefficient, expresses a correlation that can range from 0.0 (no relationship) to 1.0 (perfectly consistent positive relationship). r values show a statistically significant correlation beginning at about 0.3; statisticians rarely encounter r values in the 0.8-0.9 range.

St. Angelo performed his first regression analysis on the six elections, held over a six-year period, in which a black candidate ran for countywide office.[111] Although the black vote was not united behind one of the black candidacies, that of Earl Jennings in 1980, in the other black candidacies the black vote was sufficiently cohesive to produce a very high average correlation[111]

value of 0.787.[illegible] To provide additional statistical data, St. Angelo analyzed a second set of elections that involved black candidacies for national office and produced an even higher average correlation of 0.966.[illegible] Finally, for a third set of election returns St. Angelo turned to a group of elections that revolved around racial issues or themes. This last set of election returns also produced a very high average correlation of 0.925.[illegible] Based on the correlations established in these three sets of data, the appellants contended that voting patterns in Liberty County were racially polarized.[illegible]

We are unable to discern from the district court's findings of fact whether the court ultimately found that blacks in Liberty County act in a politically cohesive manner. In one part of its findings, the district court seems to have

discounted appellants' regression analyses; nevertheless, in other parts, the court appears to have assumed black political cohesiveness. We need not resolve this contradiction, however, since we hold that appellants' evidence established black political cohesiveness as a matter of law.

Bivariate regression analysis is widely used to show racial polarization in vote dilution cases. The Supreme Court, in Gingles, recognized the legal significance of this form of statistical analysis, see 478 U.S. at 53 n. 20, 106 S.Ct. at 2768 n. 20; this circuit also has approved its use. See Carrollton Branch of the NAACP v. Stallings, 829 F.2d 1547, 1558 (11th Cir. 1987), cert. denied, -- U.S. --, 108 S.Ct. 1111, 99 L.Ed.2d 272 (1988); see also McMillan v. Escambia County, 688 F.2d 960, 966 n. 12 (5th Cir. 1982), vacated and remanded in light of

1982 amendment to the Voting Rights Act, 466 U.S. 48, 104 S.Ct. 1577, 80 L.Ed.2d 36 aff'd 748 F.2d 1037, 1043 n. 12 (1984). Despite these precedents, the district court rejected St. Angelo's statistical analyses. The court appears to have done so for two reasons, neither of which is valid.

[10] First, the court found the statistical base for St. Angelo's first regression analysis -- the six elections in which a black candidate ran for countywide office -- inadequate to support his ultimate finding of black political cohesiveness because voting was not polarized in the 1980 primary elections in which Earl Jennings sought the Democratic nomination for a seat on the school board.[11] The Supreme Court has stated that "the fact that racially polarized voting is not present in one or a few individual elections does not necessarily

negate the conclusion that the district experiences legally significant bloc voting."[11] Gingles, 478 U.S. at 51, 106 S.Ct. at 2770. In the face of data from the other Liberty County black candidacies for countywide office, all of which demonstrated extremely strong black vote polarization, we hold that the trial court erred in disregarding St. Angelo's first regression analysis.

[11, 12] Because Liberty County has had only six elections involving minority candidacies for countywide office, the appellants expanded their statistical information base by having St. Angelo analyze the two other sets of elections we have described. The district court, as its second reason for rejecting St. Angelo's finding of black political cohesiveness, concluded that St. Angelo's reliance on the data these analyses produced was improper because these

elections did not involve the electoral systems challenged in these cases.[111] These two other sets of elections, as we have noted, depicted Liberty County voting patterns in state and federal elections involving a minority candidate[111] and in elections in which racial issues were strongly present.[111] As to the latter set, St. Angelo gave specific, unchallenged testimony concerning why the particular elections were included in his analysis. We hold that plaintiff's should be able to buttress their claims of white bloc voting by pointing to racial voting patterns in elections for offices they do not challenge in their section 2 suit. The use of such elections is especially appropriate when few minority candidacies are available. See Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496, 502-03 (5th Cir. 1987) (allowing use of exogenous elections in vote dilution

cases). Professor St. Angelo's regression analyses were indeed probative of black political cohesiveness; accordingly, the district court erred in disregarding them.

C.

[13] The third question in our method of analysis asks whether appellants can establish that the discriminatory effects of the current electoral system are driven by racial bias. As we have observed, this question is usually answered by examining the results of the nine totality of circumstances inquiries. These inquiries are simply different specific manifestations of the third question. As a result, the conclusions that a court draws from them are inevitably interrelated; the trial court's decision on one issue may mandate a parallel conclusion on another. More importantly, misanalysis of one issue may result in a

skewed analysis of other issues. Although the court's findings with respect to one of the totality of circumstances inquiries -- the presence of white bloc voting -- can conclusively answer the third question, the trial court will usually corroborate these findings by pointing to the results of the other inquiries.

In these cases, the district court conducted all nine of the totality of circumstances inquiries. In some, the court followed an incorrect legal standard in analyzing the evidence, thus tainting the findings that the inquiries yielded. In others, the court failed to make findings of fact adequate for appellate review. For convenience, we examine the court's totality of circumstances inquiries in their usual order.

[14] 1. History of Discrimination. The trial court felt that it was unnecessary to enumerate specific findings

concerning the history of discrimination in Liberty County; instead, the court generally noted that North Florida and Liberty County have an undisputed history of "extensive official discrimination affecting the rights of blacks to participate in the political process." The phrase "affecting the rights of blacks to participate in the political process" is inherently ambiguous and, standing alone, is incapable of meaningful review. Moreover, it fails to answer several important questions that are inherent in the "History of Discrimination" inquiry in these cases. To what acts of discrimination was the district court referring when it stated that North Florida and Liberty County have a history of "extensive official discrimination"? How debilitating were these acts to the ability of blacks to participate in the political process? To what extent do the

effects of these acts still influence current political behavior? Without answers to questions such as these, we cannot assess the extent to which blacks in Liberty County continue to suffer from the effects of past discrimination.

Florida first adopted its at-large system for the election of county commissioners by constitutional amendment in 1900. See Fla. Const. of 1885, art. 8, § 5 (as amended). The Florida legislature instituted the at-large system for the election of county school boards in 1947. See 1947 Fla. Laws 189-90, Ch. 23726, §§ 5-9. The district court found that the 1900 constitutional amendment was not racially motivated; the court did find, however, that the 1947 legislation was the product of racial bias. see McMillan v. Escambia County, 638 F.2d 1239 (5th Cir. 1981) (finding 1947 Florida school board

at-large election system adopted with discriminatory intent), cert. denied, 453 U.S. 946, 102 S.Ct. 17, 69 L.Ed. 2d 1033 vacated in part on other grounds, 688 F.2d 960 (1982).

The Florida legislature required the counties to use the at-large system to elect school board members until 1984, when it enacted the "School District Local Option Single-Member Representation Law," Fla. Stat. § 230.105 (1987). That law authorizes a county's electorate, voting in a referendum, to replace the discriminatory at-large system with a single-member district system. Liberty County, which has not submitted the issue to referendum, apparently chooses to retain the at-large method of electing its school board members. The district court, in deciding whether this choice is the produce of racial bias, gave no weight to this sequence of historical events. As

the court stated: "even if the original racial motivation of the Florida Legislature [in 1947] was imputed to the Liberty County School Board 40 years later, this Court would not be inclined to give substantial consideration to this factor."[11]

[15] The Supreme Court has observed that "Congress intended that the Voting Rights Act eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination." Gingles, 478 U.S. at 69, 106 S.Ct. at 2776. In deciding whether the Act has been violated, therefore, a court must "conduct a searching and practical evaluation of past and present reality." Id. at 65, 106 S.Ct. at 2774 (emphasis added).[11] The trial court accordingly erred when it refused to give any weight to the legislature's reason -- to discriminate against blacks -- for

prescribing the at-large system as the method of electing school board members in Florida.

2. Racially Polarized Voting. The appellants relied on a Racial Polarization Index prepared by Professor St. Angelo to establish white voter polarization in Liberty County. To formulate this index, St. Angelo first needed to determine how many blacks voted for black candidates. Three methods are commonly used to make this determination. The first, precinct analysis, was unavailable in these cases since it requires at least one almost all black district. The second method involves exit polling, which was also unavailable. In these cases, St. Angelo used a third method that extrapolates district-wide electoral patterns from the results in certain key precincts. St. Angelo first examined several almost all white voting precincts to determine the

percentage of the white electorate that voted for a particular candidate in these precincts. Using these percentage figures, St. Angelo then determined the percentage of the white electorate in the county that voted for a particular candidate. Having established the percentage of the white electorate's vote each candidate received, St. Angelo determined the percentage of the black electorate's vote each candidate received. Subtracting the white percentage from the black percentage, St. Angelo created a Racial Polarization Index.[11] The index analyzed the six elections involving a black candidate for countywide office and demonstrated that, except for one candidacy -- that of Earl Jennings in 1980, these elections exhibited significant levels of racial polarization.[11]

The district court concluded that while St. Angelo's racial polarization analysis did establish a "statistically significant degree of racial polarization," it did not establish a "legally significant' degree of racial polarization. In other words, the district court accepted the statistical validity of St. Angelo's analysis, but found that the analysis was not sufficiently persuasive to constitute proof of white vote polarization.

[16] The Supreme Court has recognized that the facts of each case will determine what level of polarization is "legally significant" under the Voting Rights Act. In general, however, the Court has noted that "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." Gingles, 478 U.S. at 56,

106 S.Ct. at 2770. The district court failed to apply this legal standard to the evidence.[11]

[17] Appellants' Racial Polarization Index identified the amount of white crossover in the six elections involving black candidacies for countywide office.[11] If this evidence is taken in the light most favorable to the appellee, the average white crossover has amounted to 21% of the total white vote.[11] In terms of the total vote, white crossover has averaged 18.5%.[11] The combined voting strength of Liberty County blacks (11% of the total voting population), voting as a bloc, plus the average white crossover is therefore 29.5% of the total vote. This coalition will always be defeated by the opposing white bloc vote, which constitutes the remaining 70.5% of the total electorate. In sum, appellants presented strongly persuasive evidence of

white vote polarization. The district court erred in failing to recognize the legal significance of this evidence.

[18] 3. Other Potentially Discriminatory Voting Practices. We have held that a section 2 claim "'is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographic subdistricts.'" United States v. Marengo County Comm'n, 731 F.2d 1546, 1570 (11th Cir. 1984) (quoting Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), aff'd sub nom. East Carroll Parish School Bd. v. Marshall, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed. 2d 296 (1976)). The district court found that the challenged electoral systems in Liberty County possessed some of these features and that these features "may enhance the

opportunity to discriminate against blacks in the election process." This ultimate fact is the only finding that the district court drew from this inquiry. Standing alone, this finding is inadequate.

[19] The totality of circumstances test is more than a checklist of factual findings that a trial court must make. As in any case in which the plaintiff's claim is based on circumstantial evidence, the ultimate findings of fact yielded by the court's inquiries must, in most instances, be supported by a solid base of subsidiary findings of fact. These subsidiary findings are essential because they allow the court to judge the strength of its ultimate findings of fact and thus the weight those findings should be given when assessing the totality of circumstances as a whole. Thus, in the context of this third inquiry, it is not enough to know that certain electoral devices that can

discriminate against blacks are present in Liberty County. The court must determine why such devices are present, and how they impact on the right of blacks to participate in the political process. Only after the court asks and then answers these questions, and any other questions the answers to them may prompt, can it give appropriate weight to its ultimate findings.

4. Candidate Slating Process. The district court found that several entrenched white families in Liberty County control an informal, unofficial candidate slating process.[11] Gregory Solomon, twice a candidate for the county commission, testified that this process was not open to blacks; the court, however, disagreed, noting that Earl Jennings, who was a candidate for the school board in 1980, had run on a slate

sponsored by the county's white power structure.

[20] The results of this inquiry illustrate the interrelation and interdependence of the various totality of circumstances inquiries. As we have noted, in assessing the extent of racial polarization (the second totality of circumstances inquiry), the district court discounted appellants' statistical evidence partially because voting patterns were not polarized in Earl Jennings' 1980 candidacy. The reason for this lack of polarization may well by explained by the district court's observation that Jennings had run on a "white slate." Earl Jennings, although black, may not have been perceived as a black candidate.[11] Indeed, if Earl Jennings was not perceived to be a black candidate, the voting patterns in his race were not probative evidence of vote polarization. See

Gingles, 478 U.S. at 68, 106 S.Ct. at 2776 ("Under § 2. it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important.") (emphasis in original).

On remand, the district court should consider the possibility that the slating of Jennings on a white ticket in 1980 does not permit the inference that the candidate slating process in Liberty County is open to blacks. Particularly, the district court should consider whether the white slating process is open to black candidates who seek to represent black interests.

[21] 5. Lingering Effects of Past Discrimination. The district court correctly concluded that the lingering effects of past discrimination are relevant only if they continue to "hinder [the minority group's] ability to

participate effectively in the political process." S. Rep. No. 417, 97th Cong., 2d Sess. 29, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 206. The court found that blacks in Liberty County bear the effects of extensive past discrimination in areas such as education, employment, and health. Nevertheless, the court found that black voter registration in Liberty County is very high, generally exceeding the level of white voter registration. Similarly, the court found that there was no indication that black voter turnout was lower than white turnout. Finally, the court found that while blacks have a much lower average income than whites, "[t]he nature of Liberty County politics [] does not seem to demand great financial expenditures." These comprehensive subsidiary fact findings fully support the court's ultimate finding that black political

participation in Liberty County is not impeded by the effects of past discrimination.

6. Racial Appeals. The district court found that "overt racial appeals" were made to the voters in Liberty County during "the 1956 presidential primary campaign, a 1956 state senate campaign, and a 1958 campaign for the state legislature," but that "race has not been an issue in recent Liberty County campaigns." Because the court failed to state why it reached this ultimate finding, we cannot determine whether, as appellants contend, the finding is clearly erroneous. On remand, the court must reconsider the evidence, and therefore its ultimate finding of fact, on this issue.

[22] 7. Election of Minorities. The district court briefly noted that no black has ever been elected to countywide office in Liberty County. The court found this

electoral failure to be of reduced significance, however, noting that "if a [hypothetical] 49 percent minority consistently fails to elect candidates of their race, dilution should be suspected and will be capable of proof. That an eleven percent minority [i.e. the size of the minority in this case] has failed on four occasions to elect members of its race is not nearly so suspect. Proof of dilution in such a case is necessarily much more difficult."

The Supreme Court has held that minority electoral failure is one of the two most probative indications of vote dilution. See Gingles, 478 U.S. at 48-49 n. 15, 106 S.Ct. at 2766 n. 15. In a situation such as the one presented here, however, where the racial minority comprises only 11% of the total electorate, we agree with the district court that the nonelection of blacks is of

minimal probative value in deciding whether an electoral system is driven by racial bias.

8. Lack of Responsiveness. Based on the testimony of the named plaintiffs in this litigation, the district court found that elected county officials "are approachable and sensitive to the particularized needs of black citizens." The trial court also found, however, that in an earlier case a former superintendent of the Liberty County Schools testified that "appointing a black principal would harm a Superintendent politically," Stallworth v. Shuler, 35 Fair Empl. Prac. Cas. (BNA) 770, 772 (N.D. Fla. 1984), aff'd 777 F.2d 1431 (11th Cir. 1985). Faced with these conflicting lines of credible testimony, the trial court ultimately concluded that "[w]hile the Court finds defendants' evidence on responsiveness significant and persuasive,

that evidence cannot overcome the mistreatment received by Stallworth at the hands of the Liberty County School System." This statement prompts several questions which the court's findings of fact do not answer. For example, why did the Stallworth evidence outweigh the named plaintiffs' own testimony that Liberty County officials were responsive? If Liberty County officials are unresponsive to black concerns, to what extent are they unresponsive? Ultimately, how does this lack of responsiveness affect minority access to the political process?

9. Tenuous State Policy. The district court found that the state policy behind the challenged at-large electoral systems is well established and therefore is not tenuous. The court, however, made no findings of fact as to what the policy is. In particular, the court did not explain how the state could be committed

to a policy of having at-large elections given that its legislature has authorized the counties to abolish them. See Fla. Stat. § 124.011 (1987) (county commissions); id. § 230.105 (school boards). on remand, the court must answer these questions or explain why answers to them would be of no moment.

10. Other Factors. The nine totality of circumstances inquiries were never meant to be an exclusive list of all of the inquiries that a court should make in a vote dilution case. As the Supreme Court observed in Gingles, "[t]he [Senate] Report stresses [] that this list of typical factors is neither comprehensive nor exclusive. While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered." Gingles, 478 U.S. at 45, 106 S.Ct. at 2764

(footnote omitted). The district court identified three such additional factors during the proceedings below. The first of these, the demographics of the black population, we have already discussed in the context of the other totality of circumstances inquiries. The other two deserve separate discussion.

The court believed that the political importance of the black swing vote in Liberty county should be considered in assessing the validity of the challenged electoral systems because, in the court's view, the goal of the Voting Rights Act is to maximize black political power. Thus, the court found that since blacks constitute an eagerly sought "swing vote" in county elections, all countywide political candidates and representatives are politically responsive to black voter interests. The court further found that although black voters would be able to

elect one representative under the proposed single-member district plan, total political responsiveness to black interests would be lessened since the other four officials (on the commission and the school board) would no longer owe black interests any degree of responsiveness. The court therefore concluded that the current at-large electoral systems better met the purposes of the Voting Rights Act. Because we find that the court misunderstood the purpose of the Voting Rights Act, we need not question the accuracy of the court's judgment as to the political realities of Liberty County.

If we were writing on a clean slate, the district court's interpretation of the Act might well be persuasive; the settled state of the law, however, clearly leads us in another direction. Today, the goal of section 2 is not to maximize the

political clout of minorities, but rather to ensure minority representation in government. Thus, the amended Voting Rights Act directs the courts' attention to the question of whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." S. Rep. No. 417, 97th Cong., 2d Sess. 28, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 206 (emphasis added). Whatever the wisdom of this policy -- and even if such a policy actually reduces the overall political responsiveness to minority needs -- the policy choice belongs to Congress. We therefore conclude that the district court erred in holding that because the current at-large election method better met the purpose of the Voting Rights Act than would a single-member district

method, the continued use of the at-large method did not violate the Act.

[23] The third additional factor deemed pertinent concerned the plaintiffs' commitment to this litigation. The court noted that "many members of the plaintiff class, and some of the named plaintiffs, have either become equivocal or are downright opposed to the maintenance of this law suit." While this might be relevant to the adequacy of the class representation, we hold that class opposition to the remedy that may result from the successful litigation of a section 2 claim is irrelevant in weighing the totality of circumstances. The district court therefore erred in considering it.

IV.

We vacate the judgments of the district court and remand these cases for

further proceedings consistent with the views expressed in this opinion.

VACATED and REMANDED, with instructions.

HILL, Circuit Judge, specially concurring:

I concur in the court's judgment.

FOOTNOTES

[1]

These cases were originally brought separately. In No. 87-3406, the plaintiffs challenged the at-large system for electing the county commission; in No. 87-3406A, they challenged the at-large system for electing the school board. The district court consolidated the cases for trial.

[2]

In No. 87-3406A, the plaintiffs also alleged that the challenged electoral systems violated the fourteenth and fifteenth amendments. These constitutional claims are not before us on appeal.

[3]

Section 2 of the Voting Rights Act of 1965, as amended, states that:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State

> or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.
>
> 42 U.S.C. § 1973 (1982).

The first part of the second question-- whether the minority group could constitute a majority in a single-member electoral district -- is a straightforward, objective inquiry into the size and geographic distribution of the minority group. If plaintiffs cannot establish an affirmative answer to this question, then the court need not proceed to the far more involved issues of minority electoral cohesiveness, bloc voting, and the other totality of circumstances inquiries. Thus, judicial economy demands that this question be placed in a threshold position, rather than in its usual place in the remedy stage of the litigation.

Of course, the resulting single-member electoral system must achieve a more proportional representation of

minorities than did the previous multimember system. For example, assume a community that has a 40 percent minority population and is governed by a five-member commission elected at-large from a multi-member district. If the community had never elected a minority representative, then plaintiffs could establish the first two Gingles elements by proving that the minority could dominate one of the five created single-member districts. If, however, the community had habitually elected one minority representative, the plaintiffs would have to establish that under a single-member district structure the minority would be able to elect more representatives.

By making this statement, we do not mean to imply that the plaintiffs never challenge an election that has already occurred. In theory, plaintiffs can do so; whether they can obtain injunctive relief -- in the form of a restructured electoral system and new elections, however, is problematic. To obtain such relief, the plaintiffs would have to overcome the defense of laches -- by proving that they had not slept on their rights. In the cases before us, appellants seek to enjoin future elections under electoral systems they claim are discriminatory.

Thus, in Gingles the Court stated:

the most important Senate Report factors bearing on § 2 challenge to multimember districts are the "extent to which minority group members have been elected to public office in the

jurisdiction" and the "extent to which voting in the elections of the state or political subdivision is racially polarized." If present, the other factors, such as the lingering effects of past discrimination, the use of appeals to racial bias in election campaigns, and the use of electoral devices which enhance the dilutive effects of multimember districts when substantial white bloc voting exists -- for example antibullet voting laws and majority vote requirements, are supportive of, but not essential to, a minority voter's claim.

Gingles, 478 U.S. at 48 n. 15, 106 S.Ct. at 2766 n. 15 (citation omitted) (emphasis in original). We note that minority electoral success or failure will be an inherent element in any evidence presented as to vote polarization.

We note, however, that even in the face of compelling vote polarization evidence, a prudent trial court would still perform the other totality of circumstances inquiries. The corroborating evidence produced by these inquiries might salvage the court's decision should a reviewing court later disagree with the trial court's legal conclusion with respect to the sufficiency of the direct evidence -- usually, as here, in the form of statistics and expert opinion -- of vote polarization.

In light of our disposition of these appeals, we do not address the fourth question in our method of analysis.

[10]

In concluding that blacks would constitute 51% of the voting age population of District 1, we rely on appellants' evidence, which was not contested by the appellees. On remand, the district court may make further inquiries into the exact demographics of the proposed District 1 to ensure that blacks will constitute a majority of its voting age population.

[11]

We note also that the white crossover demonstrated in these cases is sufficient to compensate for any disparities between the black voting age population of District 1 and the politically cohesive black voting age population of District 1.

III

These six elections involved four candidacies:

Date	Election	Candidate
May 7, 1968	School Board, District 1 (1st Primary)	Charles Berrium
Sept. 9, 1980	School Board, District 1 (1st Primary)	Earl Jennings
Oct. 7, 1980	School Board, District 2 (2d Primary)	Earl Jennings
Sept. 4, 1984	County Comm'n, District 1 (1st Primary)	Gregory Solomon
Oct. 2, 1984	County Comm'n, District 1 (2d Primary)	Gregory Solomon
Sept. 4, 1984	School Board, District 1 (1st Primary)	Earl Jennings

[17]

In this opinion we use an "average correlation" value only for the sake of convenience.

[18]

Appellants' regression analysis of votes received by black candidates for countywide office is as follows:

ELECTION	PERCENT VOTE RECEIVED BY BLACK CANDIDATES PER PRECINCT/PERCENT BLACK REGISTERED VOTERS PER PRECINCT
1. May 1968 School Board Berrium	.996
2. September 1980 School Board Jennings	.578
3. October 1980 School Board Jennings	.280
4. September 1984 County Commission Solomon	.989
5. October 1984 County Commission Solomon	.962
6. September 1984 School Board Jennings	.919

Appellants' regression analysis of votes received by black candidates in state and national elections produced the following results:

ELECTION	PERCENT VOTE RECEIVED BY BLACK CANDIDATES PER PRECINCT/PERCENT BLACK REGISTERED VOTERS PER PRECINCT
1. September 1970 Democratic Primary U.S. Senate Hastings	.917
2. March 1972 Democratic Presidential Primary Chisholm	.998
3. March 1984 Democratic Presidential Primary Jackson	.983

III

Appellants' regression analysis of votes received by identified candidate or election issue in elections with a racial political content produced the following results:

ELECTION	PERCENT VOTE RECEIVED BY IDENTIFIED CANDIDATES PER PRECINCT/PERCENT BLACK REGISTERED VOTERS PER PRECINCT	
1. November 1968 Presidential Wallace, Humphrey Nixon	Humphrey	.972
2. November 1970 Governor Askew-Kirk	Askew	.847
3. March 1972 Straw Ballot Busing		.901
4. November 1976 Presidential McGovern, Nixon	McGovern	.984

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PERCENT VOTE RECEIVED BY IDENTIFIED CANDIDATES PER PRECINCT/PERCENT BLACK REGISTERED VOTERS PER PRECINCT

ELECTION		
5. November 1976 Presidential Carter-Ford	Carter	.876
6. November 1980 Presidential Carter-Reagan	Carter	.935
7. November 1984 Presidential Mondale-Reagan	Mondale	.961

17/

Appellees' expert, Charles Billings, a colleague of St. Angelo's at Florida State University, did not contest the accuracy of St. Angelo's results, but instead maintained that the use of bivariate analyses was generally inappropriate in vote dilution cases. Whether the use of such analyses is appropriate in vote dilution cases is a legal question as to which we give Professor Billings' opinion no deference.

18/

Evidence relating to Jennings' 1980 candidacy may not be a reliable indication of an absence of black electoral cohesiveness. The district court determined that Jennings was backed by the white establishment in his 1980 candidacy. Jennings, therefore, may not have been the black community's chosen candidate. See infra notes 31-32 and accompanying text.

19/

We note that the terms "racial polarization," "electoral cohesiveness," and "bloc voting" all refer to the same phenomenon. The distinction is one of connotation: "electoral cohesiveness" is generally used in reference to minority voting; "bloc voting" is generally used in reference to white voting habits, and is a pejorative; "racial polarization" is an umbrella term.

20/

We have already noted that if the small number of minority candidacies prevents the compilation of statistical evidence, the court should not deny the plaintiffs relief; rather, the court should rely on the other totality of circumstances factors to determine if the electoral system has a discriminatory

effect. See supra notes 7-8 and accompanying text. Thus, even if we were to conclude that Professor St. Angelo's reliance on data from other elections was improper, the statistical evidence adduced from the six elections involving a minority candidacy could be sufficient when combined with the rest of the totality of circumstances to establish a violation of section 2.

[11]

See table reproduced supra at note 15.

[11]

See table reproduced supra at note 16.

[11]

The district court addressed the issue of whether the challenged electoral practices were adopted or maintained with the intent to discriminate in the context of the ninth totality of circumstances inquiry -- whether the policies behind the enactment of the challenged electoral systems were tenuous. Since we view this issue as relating to the history of discrimination, we address the court's findings of fact at this point in our discussion.

[11]

We have already noted that direct evidence of present discriminatory motivation in the enactment or maintenance of an electoral system will establish a violation of the Voting Rights Act without the need for circumstantial evidence. See supra text accompanying note 6.

[illegible]

The method St. Angelo used assumed that the racial voting pattern in the almost all-white precincts would be typical of the racial voting patterns in the county as a whole. The district court relied on this fact to discredit the appellants' statistical evidence because it found wide disparities between the socioeconomic conditions in the various precincts in Liberty County. The court, however, provided no specific factual basis for this finding, nor can we find one in the record. Absent proof that such an assumption of uniform racial voting patterns is invalid, we hold that St. Angelo's method did not invalidate the legal significance of his analysis.

11/ Appellants' Racial Polarization Index found as follows:

Election	Percentage Vote Received by Black Candidate from Black Voters	Percentage Vote Received by Black Candidate from White Voters	Racial Polarization Index
1. May 1968 School Board (1st Primary)	100.0%	2.8%	97.2
2. September 1980 School Board (1st Primary) Earl Jennings	44.7%	17.0%	27.7
3. October 1980 School Board (2d Primary) Earl Jennings	64.7%	40.5%	24.2

	Election	Percentage Vote Received by Black Candidate from Black Voters	Percentage Vote Received by Black Candidate from White Voters	Racial Polarization Index
4.	September 1984 County Comm'n (1st Primary) Gregory Solomon	74.7%	18.8%	55.9
5.	October 1984 County Comm'n (2d Primary) Gregory Solomon	90.0%	32.9%	57.1
6.	September 1984 School Board (1st Primary) Earl Jennings	78.2%	14.5%	63.7

17/

Appellees' offered the expert testimony of Professor Billings to refute Professor St. Angelo's testimony. Professor Billing's evidence consisted of his opinion, based on interviews with Liberty County residents, that voting in Liberty County is not racially polarized. The district court attached no weight to this opinion, nor do we.

18/

See table reproduced supra at note 26. The column captioned "Percentage Vote Received by Black Candidate by White Voters" constitutes the white crossover.

19/

Our average includes the two elections in which no significant levels of vote polarization were found; these elections had the highest level of crossover. Arguably, our average could exclude these elections as aberrations and still be within the legal standards of section 2. See supra notes 18-19 and accompanying text.

20/

Liberty County is 89% white. 21% of 89% is 18.5%.

21/

A slating process is a procedure by which a political group determines the candidates that they will sponsor for particular offices. The resulting candidacies compose that group's "slate."

22/

Professor St. Angelo testified that blacks did not vote for Jennings in the 1980 election because Jennings was urged to run by one of the white candidates;

some blacks even believed that the white candidate had paid Jennings' filing fee. We, of course, cannot and do not make a finding of fact on this matter. Our discussion is intended only to illustrate how findings on one issue will often affect findings as to another.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GREGORY SOLOMON, et al.,

Plaintiffs,

v. CASE NOS. TCA 85-7009-MMP
TCA 85-7010-MMP

LIBERTY COUNTY, FLORIDA,
et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The named plaintiffs in this cause are four black citizens who are residents and registered voters of Liberty County, Florida. On behalf of themselves and the certified class of all black residents of Liberty County, Florida, they seek injunctive and declaratory relief against at-large countywide elections for members of the Liberty County School Board and the Liberty County Commission. Plaintiffs allege that the at-large election of members of the Liberty County Commission

unlawfully dilutes black voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Similarly, plaintiffs allege that the at-large election of members of the Liberty County School Board unlawfully dilutes black voting strength in violation of Section 2 of the Voting Rights Act, as well as the Fourteenth and Fifteenth Amendments to the United States Constitution. The defendants in this cause are the Liberty County School Board, the five Liberty County School Board members, and their successors and agents in office, all of whom are sued solely in their official capacities, as well as Liberty County, Florida, the five Liberty County Commissioners, and their successors and agents in office, all of whom are also sued solely in their official capacities.

Pursuant to Rule 42(a), Federal Rules of Civil Procedure, at the request of all

parties, the two cases herein were consolidated for trial. A non-jury trial was conducted from March 25 to March 28, 1986. On the basis of the testimony and exhibits presented at trial, facts admitted by the parties prior to trial, and review of the pleadings and post-trial submissions of the parties, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules of Civil Procedure. Unless otherwise indicated, the Court's findings and conclusions apply with equal weight to each case.

I. GENERAL BACKGROUND.

Liberty County, Florida is located in Northwestern Florida, within the Northern District of Florida. It has a population of 4260, of which 471, or 11.06 percent, are black.

The five members of the Liberty County School Board are elected at-large

from five residency subdistricts and serve four-year terms. Fla. Stat. Ann. §§ 230.05-230.10 (West 1977 & Supp. 1986). Candidates run for numbered seats corresponding to the districts in which they live, but each must be elected by the voters of the entire county. Both the primary and the general elections are conducted at-large. A majority of the votes cast is necessary to avoid a runoff in the primary. In the general election, however, there is no majority vote requirement.

The five members of the Liberty County Commission are elected for staggered four-year terms in at-large elections. Under this system, as with the school board, candidates run for numbered seats corresponding to the districts in which they live, but each must be elected by the voters of the entire county. Again, a majority vote is required to

avoid a runoff in the primary, but not to win the general election.

There have been only four black candidacies for countywide elected office in Liberty County. Charles Berrium in 1968, and Earl Jennings in 1980 and 1984, ran for seats on the school board. Also in 1984, Gregory Solomon ran for a seat on the Liberty County Commission. None of these black candidacies was successful.

II. BLACK POLITICAL PARTICIPATION IN LIBERTY COUNTY - TYPICAL FACTORS.

Both the trial presentation and the post-trial submissions conformed substantially to the structure of those "typical factors" enumerated in the Senate Report on the 1982 amendment to Section 2 of the Voting Rights Act, S. Rep. No. 417, 97th Cong., 2d Sess. 28, reprinted in 1982 U.S. Code Cong. & Ad. News 177, 206, and applied in United States v. Marengo County Commission, 731 F.2d 1546 (11th Cir.),

cert. denied, 469 U.S. 976 (1984), and United States v. Dallas County Commission, 739 F.2d 1529 (11th Cir. 1984). This Court's findings will be similarly structured.

1. History of Official Discrimination Affecting Black Political Participation.

Plaintiffs presented the expert testimony of Dr. Jerrell Shofner to establish a long history of extensive official discrimination in Florida, and in Liberty County particularly. A pervasive official policy of restricting the opportunities of blacks to register, vote, and otherwise participate in the election process was shown. This testimony is irrefutable, and defendants have made no serious attempt to challenge plaintiffs' proof on this issue. It is unnecessary to enumerate specific findings on each element of this official policy -- the

Court simply finds that North Florida and Liberty County have a long history of extensive official discrimination affecting the rights of blacks to participate in political processes.

2. Racially Polarized Voting.

Plaintiffs offered the expert testimony of Dr. Douglas St. Angelo to prove that voting in Liberty County is racially polarized. In his analysis of Liberty County voting behavior, Dr. St. Angelo utilized statistical methods, including a bi-variate regression analysis. This technique examined the correlation between the percentage of voters of one race in a voting precinct and the percentage of votes received by the identified candidate. The product of this analysis is a regression coefficient, or "R," which can range from 0 to 1. An R of 0 indicates that there is no relationship between the first variable,

race, and the second variable, election results. An R of 1 indicates that the two variables are perfectly related. Dr. St. Angelo testified that an R of .3 or .4 would be statistically significant, an R of .5, .6, or .7 would be an extremely high correlation, and an R of .9 would be an extraordinarily high correlation.

Dr. St. Angelo performed this analysis on three types of elections between 1968 and 1984. Specifically, he examined the six elections for countywide office in which black candidates ran, three state and national elections in which black candidates ran, and seven state and national elections said to have involved either candidates or issues with a racially political content.

The regression analysis of black candidacies for countywide office yielded an R in excess of .9 in four of the six elections. The other two were .578 and

.280. Dr. St. Angelo concluded from this analysis that voting in Liberty County when a black candidate is running shows a high degree of racial polarization. The remaining two groups of elections were then analyzed to confirm this conclusion. In the three state and national elections in which there were black candidates, each yielded an R in excess of .9. In the third group of seven selected state and national elections, an R in excess of .8 was found in two elections, and an R in excess of .9 was found in the other five. Dr. St. Angelo concluded that these elections also demonstrated a high degree of racial polarization in Liberty County. His ultimate conclusion, therefore, was that in a wide variety of elections, voting in Liberty County is racially polarized.

Dr. St. Angelo also used a second statistical method to analyze voting

polarization in Liberty County. He computed a racial polarization index by determining the percentage of votes cast by black voters for a black candidate, and then subtracting the percentage of votes cast for the same candidate by white voters. This analysis was applied to corroborate the findings derived from the bi-variate regression analysis. Dr. St. Angelo concluded that the results of the racial polarization index do support the conclusion drawn from the bi-variate regression analysis -- that voting in Liberty County is racially polarized.

Defendants offered the expert testimony of Dr. Charles Billings to challenge Dr. St. Angelo's conclusions. Dr. Billings testified that the statistical methods used by Dr. St. Angelo were inappropriate, and, in his opinion, could not accurately measure racial polarization in Liberty County.

In Thornburg v. Gingles, 106 S. Ct. 2752 (1986), the Supreme Court construed "for the first time § 2 of the Voting Rights Act of 1965, as amended June 29, 1982." Id. at 2758. A major portion of the Court's opinion deals with the standard for "legally significant" racial bloc voting. Id. at 2769-70. Although the Court attempted to give some direction to this inquiry, the following statements represent the Court's bottom line: "As must be apparent, the degree of racial bloc voting that is cognizable as an element of a § 2 vote dilution claim will vary according to a variety of factual circumstances. Consequently, there is no simple doctrinal test for the existence of legally significant racial bloc voting." Id. at 2770.

The Court has no doubt that Dr. St. Angelo's analyses reflect some statistically significant degree of racial

polarization as he understood that term. It is this Court's findings, however, that the overall degree of racial polarization, as the Court understands that term, has not been proved to be legally significant, within the context of this case. Several factors have contributed to this finding.

Dr. St. Angelo's testimony indicated that his statistical methods sought only some mathematical correlation between the chosen variables. Further, he only examined his correlation between two variables -- percentage of votes received by the black identified candidates, and percentage of black registered voters. On cross-examination, defendants questioned Dr. St. Angelo on a variety of other variables which could explain the correlation he found. Dr. St. Angelo had investigated no other variables. His consistent reply to this line of questioning was that polarization could be

explained by many factors, but is presence is undeniable. He testified that while the variables proposed by defendants might explain his finding of polarization, they had no effect on its credibility. Consequently, Dr. St. Angelo has made it clear, both in terms of his formula and in his testimony before this Court, that he sought only a raw statistical correlation between the two variables he chose. Upon find such a correlation, he made no attempt to determine whether race was actually the determinative variable in the voting patterns.

Defendants challenged Dr. St. Angelo's testimony for its failure to prove that race was the motivating factor in the statistical correlation he discovered. Such a challenge is based on arguments best expressed by Judge Higginbotham in his concurrence in Jones v. City of Lubbock, 730 F.2d 233 (5th Cir.

1984). This type of challenge to statistical evidence of racial polarization has now been precluded by the opinions in Thornburg. Part III-C of Justice Brennan's opinion, joined by only three other justices, rejected the same arguments advanced by defendants herein. After addressing those arguments at length, Justice Brennan stated the following conclusion:

> In sum, we would hold that the legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation of certain candidates. plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent.

Thornburg, 106 S.Ct. at 2779. Justice O'Connor's concurring opinion was also joined by three other justices. Addressing Part III-C of Justice Brennan's opinion, Justice O'Connor's opinion states:

> Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, I agree with the plurality that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters.

Id. at 2792 (O'Connor, J. concurring). The bare statistical correlation contemplated by Justice Brennan's opinion is precisely what was sought to be established through Dr. St. Angelo's testimony. It is clear that the Thornburg opinions render this specific challenge to Dr. St. Angelo's testimony meritless.

The Court, however, has its own concerns about Dr. St. Angelo's regression analysis is the fact that, by its own terms, it only seems to measure the polarization of the black vote. It is apparent from the reported cases that such

is the usual case. Nevertheless, since the Voting Rights Act is aimed at protecting minority political participation, it seems that white voting behavior is at least as relevant, if not more so, than black voting behavior. While polarization of black voters may be a significant indication of the racial political character of an area, a black minority will never be effectively disenfranchised by its own bloc voting. Instead, it is the majority's bloc voting in an at-large system which poses that threat. It is noteworthy that the Thornburg opinions focus on polarization of the majority vote, and that plaintiffs' expert in Thornburg apparently subjected white voter behavior to the same statistical analyses which had been applied to black voter behavior. Thornburg, 106 S.Ct. at 2767-2772.

An examination of the election return from Liberty county shows that black candidates receive substantial support from precincts with little or no black registration. Furthermore, in contrast to much of Dr. St. Angelo's analysis which depends on inferences and assumptions, there is no doubt that black candidates receive white votes; the vote totals for black candidates in the substantially all-white precincts greatly exceeds the black registration.

Dr. St. Angelo's racial polarization index directly supports the Court's position on white polarization. The index takes into account the percentage of white votes received by the black candidate, and the raw figures which represent that support are significant percentages in every election except one. This degree of white support is precisely why the racial polarization index figures are much more

moderate than the regression analysis figures.

Dr. St. Angelo's regression analysis was limited by the fact that there have been only four black candidacies for countywide office in Liberty County. Only three black citizens have offered themselves for election. This is not a case, therefore, in which black candidates have a long history of consistent failure. Of the six elections in which there were black candidates, one was found to have not even a statistically significant degree of racial polarization. This was the October 1980 school board election in which Jennings was a candidate. As noted by the Court in Thornburg, "a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." Id. at

2770. Explaining further, the Court stated:

> The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances. One important circumstance is the number of elections in which the minority group has sponsored candidates. Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process. Similarly where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim.

Id. n.25. Obviously, this first group of elections which Dr. St. Angelo analyzed is the most relevant, if not the only relevant group. It seems equally as obvious that the small number renders any statistical conclusions much less probative than plaintiffs argue.

Apparently, plaintiffs would concede this point; the small number of directly relevant elections explains Dr. St.

Angelo's reliance on analysis of selected state and national elections to support his findings and conclusions. The Court has several problems with his choice of elections. Initially, the last four general elections for president admittedly contained no overt racial issues. Dr. St. Angelo found that the black vote was polarized around identified candidates in each of those elections -- McGovern, Carter, Carter, and Mondale. The election results show that President Carter received a majority vote in every precinct in Liberty County in both 1976 and 1980, with but a single exception. As for the Askew-Kirk race for governor of Florida in 1970, Dr. St. Angelo found that the black vote was polarized in favor of Askew. The election returns from Liberty County, however, show that Askew won every precinct. Rather than supporting Dr. St. Angelo's finding of polarization, these

elections support the Court's finding of a flaw in his analysis. Dr. St. Angelo can show a correlation between black registration and the black vote received by some candidate in almost any election. Assuming his analysis is entirely correct, he seems simply to have demonstrated that black voters vote largely as a block, whether it is for a black candidate or a white candidate, and whether it is in accord with the white preference or not. These elections also support the Court's finding that the white vote is much less polarized that the black vote.

Addressing Dr. St. Angelo's racial polarization index, the Court is troubled by the necessity of inferences at every step of the formula. The results were arrived at after a long and involved computation during which a number of assumptions and inferences were made. While such an analysis invites error

generally, some specific problems can be pointed out in this case.

The voting patterns of whites in precincts one and two, the mixed precincts, were calculated on the basis of white voting patterns in precincts, three, four, five, six, and seven, in which there are very few blacks. This is of dubious validity in light of two characteristics of Liberty County which were shown at trial. First, it is an expansive county, encompassing vast rural areas as well as several small towns and communities. It cannot be assumed that the various citizens of Liberty County have concurrent political interests. Second, plaintiff Solomon himself testified that the white residents of precincts one and two are more "tolerant" in general than residents of the predominantly white areas of Liberty County. The Court draws two conclusions from these characteristics.

First, any attempt to project voting behavior in one precinct on the basis of voting behavior in another precinct, under the circumstances present in Liberty County, is necessarily speculative. Second, the evidence in this case demonstrates affirmatively that if racial considerations are determinative, voting behavior of whites in precincts one and two cannot be accurately predicted from the voting behavior in the other precincts.

The Court has previously concluded that the numbers generated by Dr. St. Angelo's racial polarization index do not support plaintiffs' position, but rather support the Court's finding of no racial polarization. See supra p. 9. The Court also finds that those numbers cannot be relied upon as accurately reflecting real voting behavior in Liberty County; actual figures could vary greatly and be even

more favorable to defendants than the Court has found these figures.

For the foregoing reason, the Court finds that voting in Liberty County is not racially polarized.

3. Enhancing Factors.

"A vote dilution case 'is enhanced by a showing of existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts.'" Marengo County, 731 F.2d at 1570 (quoting Zimmer V. McKeithen, 485 F.2d 1297,1305 (5th Cir. 1973)(en banc), aff'd per cirium sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). Candidates for both the Liberty County Commission and the Liberty County School board must run for one of five numbered seats corresponding to the

district in which they reside. Because of this requirement, an anti-single-shot provision would be irrelevant. Marengo County, 731 F.2d at 1570-71 n.45. There is a majority vote requirement to win the party nomination, but not the general election. Liberty County does present a vast area to cover in an at-large campaign, and this factor could work to the detriment of black candidates because of their lower average income. On balance, the Court that finds these features of the Liberty County election system may enhance the opportunity to discriminate against blacks in the election process.

4. Candidate Slating process.

Plaintiffs have established that there exists in Liberty County some very informal, unofficial candidate slating process. That process consists of candidates aligning themselves with other

candidates in what is referred to as a "lineup." These slates of candidates are aligned with the large entrenched families of Liberty County, and usually include members of those families. The only evidence of whether this process is open to blacks was offered by Solomon. He testified that Jennings had been in a lineup in his 1980 campaign for school board, and that that particular lineup had failed to achieve its goal of defeating the incumbent Hornsby. The Court cannot conclude, on the basis of this record, that blacks have been denied access to this informal process.

5. Lingering Effects of Past Discrimination.

The Senate Report states this factor in the following terms: "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as

education, employment and health, which render their ability to participate effectively in the political process." S. Rep. No. 417, 97th Cong., 2d Sess. 29, reprinted in 1982 U.S. Code Cong. & Ad. News at 177, 206 (emphasis added). The Court reads this factor to direct consideration of only those lingering effects of past discrimination "which hinder their ability to participate effectively in the political process." The Senate Report includes a footnote at the end of this factor, the content of which further supports the Court's interpretation:

> The courts have recognized that disproportionate educational employment, income level and living conditions arising from past discrimination tend to depress minority political participation . . . . Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the

> depressed level of political participation.

Id. (citations omitted). At least according to the Senate Report, therefore, the focus of this factor is on depressed political participation and not on depressed socio-economic status. Other courts share this interpretation. After finding black political participation generally to be at least equal to that of whites, the district court in McCord v. City of Ft. Lauderdale, 617 F. Supp. 1093 (S.D. Fla. 1985), stated: "Consequently, although the court received evidence presented by plaintiff in [the areas of education, employment, and health], the qualification in the Senate report of effects 'which hinder their ability to participate effectively in the political process' makes such evidence irrelevant as a practical matter". 617 F. Supp. at

1103-04;[1] see also Marengo County, 731 F.2d at 1567.

Plaintiffs presented evidence to demonstrate that blacks in Liberty County currently bear the effects of past discrimination in areas such as education, employment, and health. The evidence does not indicate, however, that black political participation has been stifled by those effects. Indeed, the evidence indicates that the opposite is true. Voter registration is very high in Liberty County, and there is evidence that since 1981, when the registration books were purged for the first time in several years, black registration percentage has exceeded white registration percentage. There is no evidence presented that black turnout is substantially different from white turnout.

Plaintiffs rely heavily on the fact that only three black candidates have ever

sought countywide office in Liberty County. The Court places greater significance, however, on the fact that there have been three black candidacies since 1980. Two of those candidacies were successful enough to reach a second primary wherein the black candidates each received over forty-one percent of the votes cast. Blacks in Liberty County have made significant and increasing efforts since 1980 to win election to countywide office.

Defendants took the very direct approach of simply asking witnesses what impediments existed in Liberty County to black political participation. Several witnesses answered that there are no obstructions to black voter registration, no obstructions to black voting, no obstructions to blacks having their votes fairly counted, and no obstructions to

blacks qualifying to run for public office.

The evidence in this case indicates a lower average income for black families than for white families, and the Court is aware that income often affects political opportunities. The nature of Liberty County politics, however, does not seem to demand great financial expenditures. The predominant campaign approach is door-to-door solicitation of support. In addition, the Democratic Executive Committee has sponsored rallies to which all candidates were invited and which the black candidates attended. These campaign methods are particularly well-suited to Liberty County's sparse population, as well as its general economic conditions.

The Court finds, therefore, that there is no significant impediment to black political participation in Liberty County, and that black political

participation in recent years has been substantial.

6. Racial Appeals.

The sixth factor is whether political campaigns have been characterized by overt or subtle racial appeals. There is no evidence before this Court to suggest that recent campaigns have been so characterized. Plaintiffs have presented evidence of overt racial appeals in Liberty County during the 1956 presidential primary campaign, a 1956 state senate campaign, and a 1958 campaign for the state legislature. The Court is not persuaded by this evidence. In all probability, some evidence of racial appeals could be produced for every election in the South in 1958. The history of official discrimination in Liberty County has already been found and will be given appropriate consideration. The question is how far has Liberty County

progressed since 1958. Plaintiffs introduced no substantial evidence to suggest that recent campaigns have been characterized by racial appeals.

The evidence suggests that race has not been an issue in recent Liberty County campaigns. On cross-examination, Solomon testified that it would have been foolish for either Jennings or himself to base their candidacy on the representation of the black community. As for the white candidates, every witness who addressed the issue except Dr. St. Angelo, testified that the black vote in Liberty County is essential for election. Regardless of Dr. St. Angelo's testimony, the citizens of Liberty County believe that an election cannot be won without black support. It is apparent, therefore, that in recent years any candidate, whether white or black, would have been ill-advised to rely on racial appeals to win a Liberty County

election. In any event, no such appeals have been shown to have occurred.

7. Election of Minorities.

Not a single black citizen has ever been elected to countywide office in Liberty County.

8. Lack of Responsiveness.

Both the Senate Report and the case law indicate that unresponsiveness of elected officials to minority needs is less important than other, more objective factors. See Marengo County, 731, F.2d at 1572. Indeed, the Senate Report indicates that unresponsiveness is not an essential part of plaintiffs' case. S. Rep. No. 417, 97th Cong., 2d Sess. 29 n.116, reprinted in 1982 U.S. Code Cong. & Ad. News at 117, 207 n.116. Both plaintiffs and defendants, however, have produced evidence on this factor.

Plaintiff first attempted to establish a lack of responsiveness by

directly questioning witnesses on the quality, and equality, of services received by the black community. The imbalances pointed out are not substantial and do not evidence a significant lack of responsiveness.

Defendants offered proof of their responsiveness through testimony that Liberty County elected officials, at least those defendants herein, are approachable and sensitive to the particularized needs of black citizens. This testimony is persuasive because it was elicited not from defendants, but from named plaintiffs.

Finally, plaintiffs rely on this Court's findings and conclusions in Stallworth v. Shuler, 35 F.E.P. 770 (N.D. Fla. 1984), aff'd, 777 F.2d 1431 (11th Cir. 1985). During the course of the trial of that case, a former superintendent of the Liberty County

Schools testified that "appointing a black principal would harm a Superintendent politically." Id. at 772. Consequently, he never considered a qualified black candidate for such position. This court found that the defendants, the Liberty County School Board and the two most recent Superintendents, had indulged in deliberate racial discrimination in employment. As to the Liberty County School Board, the Stallworth decision demonstrates a serious and significant lack of responsiveness.

While the Court finds defendants' evidence of responsiveness significant and persuasive, that evidence cannot overcome the mistreatment received by Stallworth at the hands of the Liberty County School System. Plaintiffs have proved a significant lack of responsiveness to the interests of blacks by Liberty County's elected officials.

9. Tenuous State Policy.

The final factor enumerated in the Senate Report is whether the policy underlying the questionable practice is tenuous. Plaintiffs correctly concede that there was no racial motivation behind the 1901 amendment to the Florida Constitution which provided for at-large election of county commissioners. McGill v. Gadsden County Commission, 535 F.2d 277, 281 (5th Cir. 1976). Yet plaintiffs contend that the state policy has now shifted in favor of single-member districts. This shift in policy is evidenced by the 1982 change from multi-member to single-member districts for the Florida Legislature. Fla. Stat. Ann. §§ 10.101-10.103 (West Supp. 1986), and the 1984 legislation which provides the option of changing from what had been mandatory at-large elections to single-member districts. Id. § 124.011 (county

commissioners) and § 230.105 (school board members).

The Court cannot agree with plaintiffs' assertion that Liberty County's at-large election of county commissioners is contrary to Florida's state policy. The 1984 legislation simply allows single-member districts, it does not mandate them. Apparently, Liberty County has elected its commissioners in accordance with state law for at least 86 years. The policies underlying these at-large elections are not tenuous.

Plaintiffs correctly point out that the 1947 legislation changing the democratic primary election for school boards from single-member to at-large was racially motivated. NAACP v. Gadsden County School Board, 691 F.2d 978, 982 (11th Cir. 1982). Only since 1984, however, has Liberty County had the power to change from an at-large system to

single-member districts. There is nothing in the record to suggest that Liberty County's maintenance of the at-large democratic party for school board since 1984 has been racially motivated. The Court cannot find that the policy underlying the at-large democratic primary for Liberty County School Board is tenuous. It has been 40 years since the state legislature mandated such a system with an improper motive, and only three years since the Liberty County School Board was first given authority to alter the system. Under these circumstances, even if the original racial motivation of the Florida Legislature was imputed to the Liberty County School Board 40 years later, this Court would not be inclined to give substantial consideration to this factor.

As the Court has already found with respect to the county commission, the

recent legislative enactments have not left state policy at odds with Liberty County's at-large school board elections.

III. ADDITIONAL FACTORS

The evidence presented at trial suggested several factors other than those enumerated in the Senate Report which are operative in Liberty County. Although these factors may overlap the Senate Report's typical factors to some extent, they are treated separately because of their unique factual significance in this case.

1. Black Population and Residency in Liberty County.

This case differs from the usual Voting Rights Act case, in that the minority constitutes such a small proportion of the total population. Only 471 blacks live in Liberty County -- only 11.06 percent of the total population. The residency districts in Liberty County

were changed in 1985 pursuant to a plan proposed by plaintiffs. The new districts are almost perfectly proportional, ranging in population from 827 to 863. The black population of Liberty County is concentrated almost exclusively in District I, where 423 black reside. Despite this concentration, blacks still comprise only 49 percent of the total population of District I, and only 46.2 percent of the registered voters in District I. There are less than fifty blacks living in the other four districts combined. The black population in Liberty County, therefore, is negligible in all districts except one, where it is a substantial minority.

Plaintiffs developed and proposed the current district lines. It seems to have been the goal of that effort to include the residentially concentrated black

community in a single district wherein they could collectively exercise their greatest political influence. Despite this obvious effort to create a predominantly black district, and despite the intense residential concentration of blacks, those few black who reside outside the large black residential area preclude the creation of a predominantly black district. Thus, despite plaintiffs' best efforts, there is still no district in Liberty County wherein blacks constitute the majority of residents or registered voters.

Dr. St. Angelo testified that if Solomon had run for county commissioner from the current District I under a single-member district voting plan, he would have been successful in his 1984 candidacy. The Court finds that a black candidate could possibly be elected from District I. This finding is based less on

Dr. St. Angelo's expert opinion than on the Court's previous observation that black candidates in Liberty County have received substantial support from white voters. It is interesting to compare plaintiffs' assertion that voting in Liberty County is racially polarized to an extraordinary degree, with their assertion that a black candidate could be successful in a single-member district election, assuming continuing white support. Of course, plaintiffs would say this is merely a matter of degree -- they concede the minimal white support necessary for a black to win in a single-member district, but protest the extreme racial polarization that prevents the at-large election of black candidates. The election returns, and the Court's findings to this point, do not support any such characterization of Liberty County voting patterns.

Simply put, the bottom line of plaintiffs' position is that Solomon, a black candidate who received 41.5 percent of the countywide vote, in a county where blacks are only 11.51 percent of the registered democratic voters, would have won election from a 49 percent black district in a single-member district election. That fact seems beyond peradventure, but the Court's blunt restatement of plaintiffs' position demonstrates that Liberty County's at-large election system may not fall within the intended reach of the Voting Rights Act, and may not run afoul of the constitutional provisions in question.

2. The Swing Vote Concept.

Defendants contend that black voters in Liberty County exert considerable political influence through utilization of the swing vote concept. Liberty County is fractionalized along family lines and most

local elections are hotly contested. Dr. Billings testified that such a political climate is suitable for the exercise of the swing vote concept. Further, he testified that his research in Liberty County indicated a widely held belief that black voters operate as the swing vote in county elections. Plaintiff Solomon testified that the black vote is actively sought by white candidates and is decisive.

In rebuttal, plaintiffs offered the testimony of Dr. St. Angelo, who prepared a statistical analysis of thirty-five county-wide elections between 1970 and 1984. This analysis used the same statistical methodology as Dr. St. Angelo has used in his racial polarization index. For reasons stated earlier in this order, the Court is reluctant to rely on that methodology.

On this issue, however, Dr. St. Angelo's analysis would not be probative, even if its accuracy was beyond doubt. That is because the evidence establishes that voters and candidates in Liberty County believe that the black vote is essential to success. The significance of this perceived black status does not depend on its truth in fact.

The perception explains the efforts of white candidates to secure black support and the degree of availability, responsiveness, and sensitivity that white officials have demonstrated toward black constituents. Although the Court has previously found a significant lack of responsiveness by elected officials to the interests of blacks in Liberty County, the degree of responsiveness which has been found can only be attributed to this perceived black political influence.

3. Plaintiffs' Commitment to this Litigation.

Testimony at trial indicated that many members of the plaintiff class, and some of the named plaintiffs, have either become equivocal or are downright opposed to the maintenance of this lawsuit. Jennings, a named plaintiff, testified that he no longer wanted to be a plaintiff. He had joined the suit with the understanding that there would be a black majority in one district. When apprised of the actual racial composition of the current districts, he no longer felt single-member districts would be in the interest of black citizens. Patricia Beckwith, also a named plaintiff, testified that some members of the black community oppose single-member districts. Moreover, she testified that during the pendency of this suit, upon learning that no single-member district would be

predominantly black, she too had changed positions and opposed single-member districts. At the time of the trial, however, she had resumed her support of this lawsuit. Finally, there were several references in the testimony to a petition which has been circulated in Liberty County opposing single-member districts. Apparently, it was circulated and signed in the black community. While the propriety of Liberty County's election system does not depend on whether, why, or what proportion of blacks favor a change, their equivocation and opposition demonstrates a judgement on the part of some blacks that they are able to exercise their greatest political influence under the current at-large election system.

IV. CONCLUSIONS

1. Voting Rights Act Claims.

Plaintiffs' first claim is that the at-large election of members of the

Liberty County Commission and the Liberty County School Board has a racially discriminatory result -- the unlawful dilution of black votes. This claim is brought pursuant to the amended Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

Throughout this order, the Court has referred to the Senate Report on the 1982 amendment to Section 2 of the voting Rights Act. That report is very thorough. More importantly, however, the report indicates that the committee undertook an exhaustive analysis of the prior provision, the case law interpreting it, and the amended provision. The result of this detailed analysis is the carefully chosen words of the statute; those most significant issues surrounding the interpretation and application of the law were addressed within the terms of the amended provision:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

An at large election scheme is not a per se violation of this provision. Thornburg, 106 S.Ct. at 2765; Dallas County, 739 F.2d at 1534; Marengo County, 731 F.2d at 1564. Instead, any violation must be found by a totality of the circumstances. Consideration of the totality of the circumstances is generally organized around those factors enumerated in the Senate Report. See Marengo County, 731 F.2d at 1565-66; Dallas County, 739 F.2d at 1534-35. Those factors, however, were not intended to be exclusive. S. Rep. No. 417,97th Cong., 2d Sess. 29, reprinted in 1982 U.S. Code Cong. & Ad. News at 177, 207; Thornburg, 106 S.Ct. at 2764; Dallas County, 739 F.2d at 1540.

It is implicit from Congress's choice of the "totality of the circumstances" standard that none of the individual factors, nor even a majority of the factors, is a prerequisite to a finding of

a violation. The Senate Report stresses this point expressly:

> The cases demonstrate, and the Committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.
>
> . . . .
>
> The courts ordinarily have not used these factors, nor does the Committee intend them to be used, as a mechanical "point counting" device. The failure of plaintiff to establish any particular factor, is not rebuttal evidence of non-dilution. Rather, the provision requires the court's overall judgement, based on the totality of the circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is, in the language of Fortson and Burns, "minimized or cancelled out."

S. Rep. No. 417, 97th Cong., 2d Sess. 29 & n.118, reprinted in 1982 U.S. Code Cong. & Ad. News at 117, 207 & n.118. This approach is clearly reflected in the decisions of courts in this and other circuits construing § 1973. See e.g., Marengo County, 731 F.2d at 1574. The

Eleventh Circuit Court of Appeals has decided that racial polarization 'will ordinarily be the keystone of a dilution case." Id. at 1566. The Supreme Court in Thornburg has since addressed the relative importance of the factors as follows:

> Under a "functional" view of the political process mandated by § 2, . . . the most important Senate Report factors bearing on §2 challenges to multimember districts are the "extent to which minority group members have been elected to public office in the jurisdiction" and the "extent to which voting in the elections of the state or political subdivision is racially polarized." . . . If present, the other factors . . . are supportive of, but not essential to, a minority voter's claim.

Thornburg, 106 S.Ct. at 2766 n.15.

One final principle in this area must be noted, and, once again, it is a principle which Congress deemed sufficiently important to warrant express inclusion in the statute. Included in subsection (b) of the statute is what the Senate Report refers to as the disclaimer:

> The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b). Although the Senate Report correctly describes this disclaimer as "both clear and straightforward," S. Rep. No. 417, 97th Cong., 2d Sess. 30 reprinted in 1982 U.S. Code Cong. & Ad. News at 177, 208, "[t]here is an inherent tension between what Congress wished to do and what it wished to avoid." Thornburg, 106 S.Ct. at 2784 (O'Connor, J. concurring).

Most of the general principles expressed above have been followed in this circuit since the 1982 amendment to Section 2. In Thornburg, the Supreme Court attempted to delineate more specifically the standards to be applied in a vote dilution case. To some extent,

however, the Court tried to limit its holding to the specific factual situation presented -- a claim by a geographically cohesive minority group, which is large enough to constitute a majority in a single-member district, that a multimember electoral structure impairs their ability to elect the representatives of their choice. Thornburg, 106 S.Ct. at 2764 n.12. Nevertheless, there is enough similarity between the claims in this case and the claims in Thornburg that this Court cannot ignore the new principles expressed therein.

The Court's opinion in Thornburg contained the following language:

> While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must usually be able

> to defeat candidates supported by a politically cohesive, geographically insular minority group.

Id. at 2765-66 (footnote omitted). The Court goes on to outline more particularly the circumstances which usually will support such a claim. Id. at 2766-67. It is apparent from the Court's opinion, however, that the new principles are not intended to recede from the "totality of the circumstances" standard expressed in the statute, the legislative history, and the prior case law.

Having considered the evidence in light of these principles, the Court cannot conclude that a violation of the Voting Rights Act has been established. Black citizens of Liberty County do not have less opportunity than whites to participate in the political process and to elect representatives of their choice. Several relevant factors have been found individually to support this conclusion.

More importantly, however, the totality of the circumstance, as evidenced by the entire trial presentation, compels the Court's conclusion.

Plaintiffs were obviously aware that the Eleventh Circuit considers racial polarization the 'keystone of a dilution case." Marengo County, 731 F.2d at 1566. As noted above, that principle has now been affirmed and elaborated upon by the Supreme Court in Thornburg. Considerable efforts were made to prove racial polarization in Liberty County. Despite those efforts, the Court has found that voting in Liberty County is not racially polarized. Not only is the Court's conclusion supported by the narrow finding, but the reasons for that finding provide very strong, general support for the court's conclusion. For example, the fact that recent black candidates in Liberty County have received substantial

white support was relied on by the Court to find that voting is not racially polarized. It is also very strong evidence in favor of the Court's ultimate conclusion -- the black vote in Liberty County is not diluted in violation of the Voting Rights Act.

In many vote dilution cases under the Voting Rights Act, black political participation is shown to be depressed in terms of registration and voting. No such showing was made in this case, nor could it have been. Blacks face no impediments to registration, voting, or running for office. In these terms, black political participation in Liberty County is healthy. Although blacks historically have not sought public office in Liberty County, three black candidacies have arisen in the 1980's. Two of these made it to the second democratic primary where both received over 41 percent of the votes

cast. During this most recent period, therefore, black political participation in Liberty County has been far from depressed.

That the black vote in Liberty County is considered decisive has important consequences. It renders inapplicable a major reason for the relevance of racial polarization. In Rogers v. Lodge, 458 U.S. 613 (1982), the Supreme Court pointed out that "[v]oting along racial lines allows those elected to ignore black interests without fear of political consequences . . ." Id. at 623, quoted in Thornburg, 106 S. Ct. at 2765 n. 14. The Court has found that Liberty County elected officials show some degree of responsiveness to blacks, but have also exhibited a complete disregard of those interests on occasion. The Stallworth saga is regrettable, but the status of blacks as the perceived swing vote has to

be responsible for that degree of responsiveness and sensitivity which blacks in Liberty County do enjoy. If racial considerations are as dominant in Liberty County as plaintiffs contend, any regard for the interests of the black community would cease upon imposition of a single-member district system. Whether or not a black was elected in District I, a four member majority of each body could ignore or defeat all black interests with impunity. Dr. Billings warned of this likelihood.

The Court has found that any candidate, white or black, would be ill-advised to rely on racial appeals to win election in Liberty County. The Court has also found that no such appeals have been made in recent years. Assuming once again that race is as dominant in Liberty County politics as plaintiffs contend, a change to single member districts would made

overt racial appeals the order of the day in all districts except possibly District I.

The demographic characteristics of Liberty County are very important to the Court's decision. The population of Liberty County is extremely sparse. The black minority is not a substantial one, as it often is in these cases. Instead, it is only 11.06 percent -- only 471 persons. These figures should be compared with those in Marengo County, wherein the total population of the county was 53.2 percent black and the voting age population was 48.7 percent black. Marengo County, 731 F.2d at 1550-51 n.2. The Court does not mean to imply that the rights of a minority depend on its size. The point is that if a 49 percent minority consistently fails to elect candidates of their race, dilution should be suspected and will be capable of proof. That an

eleven percent minority has failed on four occasions to elect members of its race is not nearly so suspect. Proof of dilution in such a case is necessarily much more difficult.

Finally, the Court must observe that many of the factors mentioned herein must have occurred to the black citizens of Liberty County. That the class has lacked unity of purpose and conviction in the maintenance of this lawsuit validates the Court's conclusion to some extent. Furthermore, plaintiffs' equivocation has given the Court the distinct impression that their ultimate goal is one which the Voting RIghts Act does not secure for them. The goal of this litigation seems to have been the drawing of a district in which blacks would constitute a majority and could elect a black candidate to represent them. The language of the Voting Rights Act, however, is

result of the at-large voting system. This conclusion is based on the foregoing analysis of plaintiffs' claims under the Voting Rights Act. Accordingly, defendants must prevail on plaintiffs' constitutional claims against them as well.

The Clerk is directed to enter judgment for defendants and against plaintiffs on all claims herein.

DONE AND ORDERED this _____ day of _____, 1987.

_____
United States District Judge

(4)

CASE NO. 90-102

In the Supreme Court of the United States

October Term, 1989

LIBERTY COUNTY, FLORIDA, ET AL.,
AND
LIBERTY COUNTY SCHOOL BOARD, ET AL.,
Petitioners,

vs.

GREGORY SOLOMON, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals acted properly in remanding this vote dilution case brought under Section 2 of the Voting Rights Act, 42 U.S.C. Section 1973, to the District Court for further proceedings.

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REASONS WHY THE PETITION SHOULD BE DENIED

1. THIS CASE IS NOT RIPE FOR THE ISSUANCE OF A WRIT OF CERTIORARI BECAUSE IT HAS BEEN REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS

The Eleventh Court of Appeals has remanded this case to the District Court for further proceedings (A 3). No judgment exists either for the Plaintiffs or the Defendants. The record may well be expanded upon remand to the District Court. The additional proceedings could obviate any necessity for Supreme Court review that may otherwise exist. At this time, therefore, the case is not ripe for the issuance of writ of certiorari. *See, Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ (of certiorari) is not issued until final decree").

2. THERE EXIST NO SPECIAL OR IMPORTANT REASONS AS CONTEMPLATED BY RULE 10 OF THE RULES OF THIS COURT FOR THE ISSUANCE OF A WRIT OF CERTIORARI

The petitioners demonstrate no conflict between the court below and any other federal court of appeals or any state supreme court.

Similarly, the petitioners point to no conflict between the court below and the governing decisions of this Court, except to intimate that Judge Kravitch's concurring opinion in the Eleventh Circuit departs from *Thornburg v. Gingles*, 478 U.S. 30 (1986). To the extent Judge Kravitch's concurrence states that a Section 2 violation is established by proving the three *Gingles* factors, her opinion comports with this Court's statement in *Gingles* that most of the other Section 2 evidentiary factors "are supportive of, but *not essential* to, a minority voter's claim." *Id.* at 48 n. 15 (emphasis in original). Moreover, Judge Kravitch's opinion explicitly evaluates the totality of the circumstances (A 29 n.3) and therefore cannot be construed as contrary to this Court's decision in *Gingles*.

Also, the petitioners have not identified any important and unresolved questions of federal law requiring this Court's exercise of its certiorari jurisdiction. Certainly, the petitioners are incorrect when they state that the conflict between Judge Kravitch's opinion and Judge Tjoflat's opinion involves a question requiring certiorari at this juncture of the proceedings. Judge Kravitch's opinion suggests that proof of the three *Gingles* factors is sufficient to prove a violation of Section 2, but also explicitly notes the importance of an examination of the totality of the circumstances. Judge Tjoflat's opinion states that proof of the three *Gingles* factors may not always be enough to prove a violation and that the totality of the circumstances must be analyzed where defendants offer rebuttal evidence regarding those circumstances. To the extent there is a conflict between the opinions of Judge

Kravitch and Judge Tjoflat, the resolution of that conflict likely would make little difference in the outcome of this particular case, and little difference in the outcome of other cases brought under Section 2 of the Voting Rights Act.

With respect to this particular case, Judge Kravitch's analysis does not hinge entirely on the three *Gingles* factors, but goes further and embraces the totality of the circumstances:

> [P]laintiffs in this case also adduced strong evidence establishing the other supportive factors. On the totality of the evidence in the instant record, plaintiffs have clearly established their claim.

(A 29 n.3). Thus, her view on the overall outcome of the case is no different whether she focuses only on the three *Gingles* factors, or on the entire totality of the circumstances. Moreover, Judge Tjoflat's opinion holds that the plaintiffs have proven the three *Gingles* factors, and while he concludes the case should be remanded, his opinion certainly leaves open the possibility that he ultimately will agree with Judge Kravitch's opinion as to who should win and who should lose (A 107-108). Therefore, the resolution of whatever conflict exists in the Eleventh Circuit likely will make no difference in the outcome of this case.[1]

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[1] If it is going to make a difference, that can only be determined after the case is remanded to the District Court and allowed to run its course.

Similarly, resolution of the conflict between the Kravitch and Tjoflat concurrences will be of little consequence to other cases brought under Section 2. In most cases in which plaintiffs can prove the three *Gingles* factors, they also are able to demonstrate a violation under the totality of the circumstances. *See, e.g., Thornburg v. Ginlges*, 478 U.S. at 80; *Smith v. Clinton*, 687 F.Supp. 1310, 1317-1318 (E.D. Ark.), *aff'd* 109 S.Ct. 548 (1988). Petitioners have pointed to no case, and plaintiffs are aware of none, in which the outcome would have been different under the Tjoflat analysis from the outcome under the Kravitch analysis. Until such a case arises, there is no need to grant certiorari on this issue.

The petitioners also claim that certiorari should be granted to clarify "how small a minority may be entitled to a remedy for alleged vote dilution." (Petition at 13). That is not a sufficiently important question of federal law requiring certiorari, and is not an issue raised either by the Kravitch or the Tjoflat opinions in the Court of Appeals. Indeed, all ten judges of the *en banc* Eleventh Circuit agree that the plaintiffs in this case satisfy the requirement of *Thornburg v. Gingles* that the minority population be sufficiently large and geographically compact to constitute a majority in a single-member district (A 19-21, 107-108). With respect to the overall minority percentage in the original at-large jurisdiction, the level necessary to prevail in a Section 2 case may depend upon several factors, including the number of

seats available and the geographic location of the minority citizen.[2] *Gingles* takes those factors into account, and there is no need to grant certiorari to clarify *Gingles* and establish some overall percentage figure that is divorced from the other relevant circumstances in the case.[3]

In sum, this case raises no issues of broad application and importance sufficient to justify the writ of certiorari.

3. CERTIORARI SHOULD NOT BE GRANTED SIMPLY TO REVIEW THE EN BANC COURT'S UNANIMOUS CONCLUSION THAT THE PLAINTIFFS HAVE PROVEN THE THREE GINGLES FACTORS

The judges of the Eleventh Circuit agreed unanimously that the plaintiffs have proven the three *Gingles* factors. Certiorari should not be granted to re-examine the Eleventh Circuit's conclusion regarding these factors in this particular case.

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[2]Consequently, an 11% Black population as in Liberty County, Florida, which is sufficiently geographically compact will satisfy the *Gingles* requirement, where a 40% black population which is "spread evenly through a multimember district," *Gingles, supra*, 478 U.S. at 50, n. 15, may not, since those minority citizens may not be able to point to the at-large structure for the defeat of the minority supported candidates.

[3]The petitioners raise the spectre of a federal court requiring the creation of additional seats to accommodate a relatively small minority group. (Petition at 18). That type of relief has not been ordered in the present case, and therefore is not an issue susceptible of review here.

Petitioners make two specific contentions regarding the facts. First, they state that no evidence demonstrates the ability to create a majority black voting age population single-member district. (Petition at 29-30). However, as the petitioners concede (*Id.*) and as Judge Tjoflat's panel opinion confirms (A 201 n.10), this evidence was uncontested in the district Court. It is too late for the petitioners to attempt to contest it here. Second, the petitioners assert that no evidence was present of white voting patterns (Petition at 35). That is wrong. As the various appellate opinions indicate, abundant evidence of legally significant white bloc voting is in the record (A 24-26, 33-34 n. 8, 108, 180-181). These are not the sort of matters upon which certiorari should issue.

In addition, the petitioners complain that not enough elections were analyzed, particularly elections involving only white candidates (Petition at 37-38). However, plaintiffs presented evidence of voting patterns in sixteen separate elections (A 35-38 n. 9), some of which involved only white candidates. Moreover, the defendants at trial presented no countervailing evidence of voting patterns in any elections, whether with white candidates only or white candidates against black candidates. The evaluation of mostly black-white elections, with some white-white elections, is more than sufficient to establish a *prima facie* case of polarized voting, and is supported by a number of decisions finding polarized voting on the basis of only black-white elections. *See, Thornburg v. Gingles*, 478 U.S. at 57 n. 25; *Smith v. Clinton*, 678 F.Supp. 1310, 1317-1318 (E.D. Ark.), *aff'd*, 109 S.Ct. 548 (1988); *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th

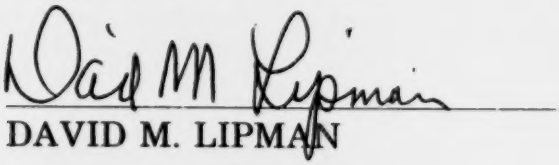
Cir. 1988), *cert. denied*, 109 S.Ct. 3213 (1989); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503-04 (5th Cir. 1987), *cert. denied*, 109 S.Ct. 3213 (1989).

These factual assertions of the petitioners do not merit the grant of a writ of certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the Respondents' Brief in Opposition to Petition for Writ of Certiorari, styled as is this certificate, has been served upon the persons listed below, the only persons required to be served, by United States mail, first class postage prepaid, on this 28th day of August, 1990:

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No. 90-102

In the Supreme Court of the United States

OCTOBER TERM, 1990

LIBERTY COUNTY, FLORIDA, ET AL.,
AND
LIBERTY COUNTY SCHOOL BOARD, ET AL.,
PETITIONERS,

v.

GREGORY SOLOMON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the decision of the court of appeals, which remanded this case to the district court for further proceedings, is ripe for review by this Court at this time.

2. Whether the court of appeals erred in holding that a 51% black voting age population sufficed to meet the threshold requirement for a vote dilution claim that the minority group "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a singlemember district" under *Thornburg* v. *Gingles*, 478 U.S. 30, 50 (1986).

3. Whether the court of appeals erred in ruling that the uncontroverted statistical evidence established as a matter of law the three factors necessary to prove a vote dilution claim under *Gingles*.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Liberty County, Florida, elects its Board of County Commissioners and its School Board from the county at-large. Both boards have five members who serve staggered four-year terms. The County is divided into five residence districts, and candidates must run for the seat on the Board of County Commissioners or School Board that corresponds to the

district in which they live. All voters in the county vote for one candidate from each district in both primary and general elections. A majority vote requirement applies in primaries, but candidates may win by a plurality of votes in general elections. Pet. App. A4-A5.

Blacks constitute 11% of the total population of Liberty County (Pet. App. A6, A162, A216) and 51% of the voting age population of District 1 (*id.* at A20, A162 & A201 n.10). No black candidate has ever won election to countywide office in Liberty County (*id.* at A25, A218, A247).

2. Respondents, four black County residents, brought suit on behalf of themselves and others similarly situated alleging that the at-large system of electing the Board of County Commissioners and School Board diluted the voting strength of black voters in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973. Pet. App. A214-A215.

The district court certified the class and held a trial in March 1986. Pet. App. A216. In ruling on respondents' claims, the court evaluated the record under each of the "totality of the circumstances" factors listed in the Senate Report accompanying the 1982 amendments to Section 2. See Pet. App. A218. The court found that respondents had shown several factors in their favor. They had presented "irrefutable" evidence that Liberty County in the past had adopted "[a] pervasive official policy of restricting the opportunities of blacks to register, vote, and otherwise participate in the election process." *Id.* at A219. In addition, the court observed that "[n]ot a single black citizen has ever been elected to countywide office in Liberty County." *Id.* at A247. The court also noted that the majority vote requirement in party primaries and the expense of campaigning

over a "vast area" that includes the entire county "[o]n balance, * * * may enhance the opportunity to discriminate against blacks in the election process." *Id.* at A238. Finally, the court concluded that elected officials showed a significant lack of responsiveness to black residents' interests. *Id.* at A249.

On the other hand, the court ruled that, although respondents' evidence of racial bloc voting was statistically significant (Pet. App. A224), "the overall degree of racial polarization * * * has not been proved to be *legally* significant." *Id.* at A225 (emphasis in original). The court reached this conclusion on several grounds: the evidence showed that black candidates received some degree of white support (*id.* at A230); there had been too few elections in which black candidates ran for countywide office (*id.* at A231-A232); the evidence showing black polarization in state and national elections failed to show comparable bloc voting by whites (*id.* at A234); and respondents' statistical techniques relied on too many inferences to be reliable (*id.* at A235-A236).

In addition, the court held that respondents had failed to demonstrate that they had the potential to elect representatives from District 1, because blacks constituted only 49% of the total population and 46.2% of the registered voters in that district (Pet. App. A254).[1] The court also found that the record did not establish that blacks had been denied access to informal slating processes (*id.* at A239); that recent elections had not been characterized by racial appeals (*id.* at A245-A246); that the lingering effects of past discrimination did not pose a significant

[1] The district court cited no figures for voting age population.

obstacle to black political participation in recent years (*id.* at A271-A273); and that the policies underlying the county's at-large election of county commissioners and school board members were not tenuous (*id.* at A251-A252).

Weighing all of these factors (*id.* at A261-A277), the court concluded that "[t]he totality of the circumstances * * * does not support the claim that at-large elections result in dilution of the black vote." *Id.* at A276. The court therefore entered judgment for petitioners by opinion and order of May 4, 1987.

3. On appeal, a panel of the Eleventh Circuit vacated and remanded the case to the district court. Chief Judge Tjoflat's opinion for the panel explained (Pet. App. A162-171) that the district court had erred in rejecting respondents' proof of the three factors necessary to prove a dilution violation under *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). Of the other Senate Report factors relevant to the totality of the circumstances inquiry, the panel found that the district court had made legally correct and factually adequate findings with respect only to two: lingering effects of past discrimination (the panel found none that affected black political participation, see Pet. App. A185-A187) and election of minorities (none had ever been elected, see Pet. App. A187-A188). In the panel's view, the district court's analysis of each of the other factors was either "taint[ed]" by virtue of its employment of an "incorrect legal standard in analyzing the evidence" or simply was not "adequate for appellate review." Pet. App. A172. See *id.* at A172-A195. The panel concluded that the case should be remanded to the district court for further findings of fact. Finally, the panel indicated that the totality of the circumstances inquiry ulti-

mately should be directed to a determination of whether respondents had established that the discriminatory effect of the system was "driven by racial bias in the community or its political system" that promised to continue in the future. *Id.* at A152.

4. The Eleventh Circuit granted rehearing en banc, and vacated the panel's opinion. Pet. App. A128. Holding that "as a matter of law * * * the appellants have satisfied the three *Gingles* factors" (*id.* at A2), the en banc court unanimously agreed that the district court's judgment should be vacated and the case remanded for further proceedings in accordance with *Gingles*. The court was equally divided, however, on the legal effect of proving those factors; as a result, the en banc court ordered the district court to give "due consideration to the views expressed in Chief Judge Tjoflat's and Judge Kravitch's specially concurring opinions." Pet. App. A3.

a. In her special concurrence, Judge Kravitch, joined by four circuit judges, explained that the undisputed evidence showed that blacks constituted 51% of the voting age population of District 1,[2] thus satisfying the *Gingles* requirement that the minority group be of sufficient size and compactness to have the potential to elect candidates in a single-member district. Pet. App. A19-A21. In addition, respondents' uncontroverted statistical evidence of black political cohesiveness was substantially similar to that which this Court in *Thornburg* v. *Gingles* held to demonstrate that black support for black candidates was "overwhelming" (Pet. App. A23-A24), and thus

[2] As the panel opinion had recognized, respondents' evidence that blacks constituted 51% of the voting age population of the district was "not contested by [petitioners]." Pet. App. A201 n.10.

was sufficient as a matter of law to show cohesiveness. Finally, respondents' statistical evidence, showing bloc voting by whites sufficient to defeat the black candidate in all cases, sufficed to meet the *Gingles* requirement that white bloc voting usually defeats the minority-preferred candidate. *Id.* at A24-A26.[3] While white voting was less polarized than black voting, this fact did not detract from the legal sufficiency of respondents' showing. *Id.* at A25.

Although Judge Kravitch would hold that proof of the three *Gingles* factors was sufficient in this case to make out a Section 2 vote dilution claim (Pet. App. A18), she also noted that "[respondents] * * * adduced strong evidence establishing the other supportive factors." *Id.* at A29 n.3. In her view, analysis of those other factors is relevant primarily "for the light they shed on the existence of the three core *Gingles* factors." *Id.* at A17-A18. She thus concluded that "[o]n the totality of the evidence in the instant record, plaintiffs have clearly established their claim" (*id.* at A29 n.3). In her view, the case had to be remanded only for further proceedings regarding a remedy for the Section 2 violation.

b. Chief Judge Tjoflat, joined by three circuit judges and Senior Circuit Judge Hill, agreed with Judge Kravitch's conclusion that respondents had proved the three *Gingles* factors. Pet. App. A107-A108. According to Chief Judge Tjoflat, however,

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[3] Judge Kravitch explained that, while she rejected the district court's conclusions concerning the legal insignificance of respondents' statistical evidence under a de novo standard of review, she rejected the district court finding that the statistical evidence was unreliable as clearly erroneous because it was not supported by record evidence. Pet. App. A30-32 n.6.

the history of the Voting Rights Act demonstrated that satisfying the three *Gingles* factors was, standing alone, insufficient to prove a violation of Section 2, at least where the defendant introduced evidence of other Senate Report factors in rebuttal. Renewing the analysis set forth in his panel opinion, Chief Judge Tjoflat concluded that a Section 2 defendant may rebut a plaintiff's showing under the three *Gingles* factors by proving "with evidence of objective factors that, under the totality of the circumstances, * * * the voting community is not driven by racial bias." Pet. App. A103. See also *id.* at A44, A78-A79, A94-A95. In his view, the case had to be remanded so that the district court could decide whether petitioner had carried this burden. *Id.* at A108.

DISCUSSION

In *Thornburg* v. *Gingles*, 478 U.S. at 42-61, this Court held that, while all of the factors listed in the Senate Report accompanying passage of the 1982 amendments to Section 2 of the Voting Rights Act are relevant to the vote dilution inquiry, Section 2 challenges to use of multimember districts generally require, as "necessary preconditions" (*id.* at 50), a three-part showing that: (1) minority voters are a sufficiently large and compact group to form a majority of the electorate in a single-member district (*id.* at 50 & n.17); (2) the minority group is politically cohesive (*id.* at 51); and (3) the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate (*ibid.*). In our view, the en banc Eleventh Circuit correctly applied these legal principles when it ruled, unanimously, that respondents' undisputed statistical evi-

dence sufficed to meet the three *Gingles* factors. No aspect of this ruling warrants this Court's review.

The Eleventh Circuit was divided on the legal effect of satisfying the *Gingles* factors in applying the totality of the circumstances test. This question may well prove to be an important one, but this case does not provide an appropriate vehicle for its consideration.[4] That question would be more fruitfully considered after the district court has had the opportunity to develop a more adequate factual record on remand and after the Eleventh Circuit—and other courts—have had the occasion to review the issues as they apply in other cases.

1. Petitioners argue (Pet. 1-13) that this Court should grant certiorari in order to "clarif[y] * * * the legal effect of the three *Gingles* threshold factors" (Pet. i)—the issue that divided the Eleventh Circuit in this case. Although the Eleventh Circuit did indeed split over whether it is necessary to show that community voting patterns are "driven by racial bias" to establish a vote dilution claim (compare Pet. App. A28-A29 n.3 (Kravitch, J., concurring) with *id.* at A78-A79, A103 (Tjoflat, C.J., concurring)), that issue is not appropriate for further review at this time.

a. In general, interlocutory review by this Court is disfavored. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & A. R.R.*, 389 U.S. 327 (1967); see generally R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 224-226 (6th ed. 1986). Jurisdiction over nonfinal orders is "to be exercised

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[4] Contrary to petitioners' assertion (Pet. 9), we do not read Judge Kravitch's opinion to "effectively eliminate[] the totality-of-the-circumstances test." In our view, the Eleventh Circuit divided over the *role* of that test in Section 2 analysis, not over whether it is an appropriate part of the analysis.

sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 252, 258 (1916) (citations omitted); see also *American Constr. Co.* v. *Jacksonville, T. & K. Ry.*, 148 U.S. 372, 384 (1893) (Court should not review interlocutory order "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause").

b. We can see no reason to depart from the general rule in this case. As is usual in cases involving interlocutory appeals, the legal issue on which review is sought may well become moot after remand. If the district court, for example, finds that the voting patterns at issue here were "driven by racial bias," the disagreement among the court of appeals judges would become purely academic.[5] Indeed, recognizing that circumstances could exist in which the two approaches outlined by the en banc court would converge, an Eleventh Circuit panel recently remanded a Section 2 case to a district court, observing "that under either view of the *Solomon* en banc court, the plaintiffs might be entitled to relief." *Meek* v. *Metropolitan Dade County*, 908 F.2d 1540, 1549 (1990).

Petitioners assert that this Court's failure to resolve the issues in this case will impose "enormous burdens * * * upon the judiciary" and will require expenditure of "untold litigation hours and ex-

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[5] Indeed, proof of persistent racial polarization in voting—a fact that the Eleventh Circuit unanimously agreed was present in this case—may itself serve as potent evidence that racial considerations motivate voter behavior. Cf. *Gingles*, 478 U.S. at 105 (O'Connor, J., concurring) ("Proof that white voters withhold their support from minority-preferred candidates to an extent that consistently ensures their defeat is entitled to significant weight in plaintiffs' favor.").

pense * * * in this and like cases" (Pet. 46-47), but they offer no support for their jeremiads. Significantly, petitioners cite no other post-*Gingles* appellate case in which a court has found it necessary even to consider, much less resolve, the question that divided the Eleventh Circuit here. The absence of other appellate cases suggests not only that failure to resolve the issue now may have limited effects beyond this particular litigation, but that the Court may profit from permitting other courts of appeals to consider the question in a variety of factual contexts.

In addition, review at this juncture would require the Court to grapple with the issues at a highly abstract level. As Chief Judge Tjoflat explained in his panel opinion, the district court's findings of fact were inadequate to permit "full appellate review" in light of his proposed approach. Pet. App. A159.[6] As a result, Chief Judge Tjoflat was unable to apply his approach to the facts of this case or to demonstrate how findings regarding the various Senate Report factors should be combined and assessed to ar-

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[6] For example, Chief Judge Tjoflat pointed out that the district court failed to identify specifically which official acts left a legacy of discrimination (Pet. App. A173), to determine whether such acts still influence political behavior (*id.* at A174), and to consider adequately the continuing significance of the state legislature's discriminatory intent in prescribing an at-large system for school board elections in 1947 (*id.* at A176-A177). Nor had the district court adequately justified its conclusion that the informal, white-controlled slating process in Liberty County was open to black candidates who wished to represent black interests (*id.* at A183-A185). The district court's opinion also left unexplained the reasons for adoption of a majority vote requirement for primaries and the effect of this factor on the ability of blacks to participate in the political process (*id.* at A183).

rive at an ultimate conclusion concerning whether "racial bias" drives the county's voting behavior. For this Court to attempt to resolve the legal issues on what the Eleventh Circuit recognized to be an inadequate factual record could have at least two unfortunate consequences.

First, this Court would have to decide important questions of law without knowing how its decisions apply to a particular set of facts. Indeed, Chief Judge Tjoflat commented that interpreting Section 2 in accord with Congress's intent requires that courts "develop a burden of proof for section 2 plaintiffs that is neither too heavy nor too light." Pet. App. A105. It is difficult to determine whether a particular response to the question that divided the Eleventh Circuit—the role of the totality of the circumstances test in Section 2 analysis—imposes a burden that is "just right" (Pet. App. A106) without reviewing its application to a particular set of facts. This difficulty is particularly pronounced in light of the highly fact-specific nature of the totality of the circumstances inquiry.[7]

Second, articulating a specific legal standard may be less important and provide less guidance to the lower courts than the application of that standard to

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[7] In his panel opinion, Chief Judge Tjoflat emphasized the fact-specific nature of his approach. The opinion noted that, "[a]s in any case in which the plaintiff's claim is based on circumstantial evidence, the ultimate findings of fact [concerning the application of the Senate Report factors] must, in most instances, be supported by a solid base of subsidiary findings of fact. These subsidiary findings are essential because they allow the court to judge the strength of its ultimate findings of fact and thus the weight those findings should be given when assessing the totality of circumstances as a whole." Pet. App. A182.

a particular set of facts. Review at this time would require the Court to assess Chief Judge Tjoflat's approach absent such a factual context, and thus the Court's determination could easily fail to clarify those aspects of Section 2 that remain uncertain. In short, because this case would require the Court to make important decisions against a background of largely hypothetical facts, interlocutory review is unwarranted.

2. Petitioners argue (Pet. 13-19) that this Court should grant certiorari to review the en banc court's unanimous holding that a voting age population of 51% in District 1 sufficed to establish the first *Gingles* factor. This holding involves application of the first *Gingles* requirement that the minority group "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district" (478 U.S. at 50). Petitioners argue that the Eleventh Circuit's application of this factor created "not only * * * a right to proportional representation, but a right to *disproportional* representation" (Pet. 17), because blacks constitute only 11% of the total population of the County, which is divided into five districts.

Petitioner's contention is mistaken.[8] By its terms, *Gingles* frames the inquiry simply in terms of whether the plaintiff class would be able to elect representatives from a single-member district. As the Court explained, the issue is whether the at-large

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[8] Petitioners' discussion of a "right to disproportional representation" (emphasis omitted) in any event rests on a mischaracterization. If respondents are entitled to a remedy in this case, that remedy at best would create a district in which the minority voters would have the *opportunity*—not the right—to elect the candidate of their choice.

system is "responsible for minority voters' inability to elect its candidates." 478 U.S. at 50. In turn, that question is answered by examining the outcome that would occur under a single-member district plan, "because it is the smallest political unit from which representatives are elected." *Id.* at 50 n.17. The Eleventh Circuit in this case simply applied those holdings to the facts of this case.

The Court in *Gingles* expressly recognized that measuring minority voting strength in terms of potential to succeed in a single-member district produces results different from those that would obtain if minority voting strength were evaluated on a proportional basis. See *Gingles*, 478 U.S. at 50-51 n.17. Precisely because Section 2 does not create a right to proportional representation, the relevant question is not how many minority voters live in the county, but whether use of single-member districts could remedy dilution of the voting strength of a plaintiff class. *Ibid.*[9] By focusing on the percentages of blacks in the County as a whole rather than the ability of blacks to elect a representative of their choice from a single-member district, it is petitioners—not the court below—that rely on notions of proportional representation.

3. Finally, petitioners contend (Pet. 27) that the en banc court misapplied the clearly erroneous standard of Fed. R. Civ. P. 52(a) in holding that respondents had satisfied the three *Gingles* factors as a

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[9] Petitioners' suggestion that the court of appeals' holding implies "requiring the creation of more seats so as to accommodate an even tinier minority group" (Pet. 18) is meritless. The opinions contain no such implication.

matter of law. As this Court stated in *Gingles*, "Rule 52(a) 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.'" 478 U.S. at 79 (citations omitted). But each of the rulings about which petitioners complain involved the correction of an error of law, and the court relied on uncontroverted evidence in the record in reaching its conclusions. In any event, an error regarding Rule 52(a)'s application to the facts of this case would not warrant further review.

With respect to the first *Gingles* factor (see Pet. 28-32), the district court, relying on statistics showing that blacks did not constitute a majority of the population or a majority of registered voters in District 1, held that they were not sufficiently numerous to form a majority of the electorate in that district. Citing *Gingles*, the Eleventh Circuit panel held that voting age population was a more apt measure of whether blacks could form a majority of the electorate than was their proportion of the entire population or of the registered voters in the county. Pet. App. A163. See also *City of Rome* v. *United States*, 446 U.S. 156, 186 n.22 (1980). Respondents' evidence that blacks constituted 51% of the voting population of District 1 was "not contested by [petitioners]" (Pet. App. A201 n.10); accordingly, the panel was correct in relying on it to find that the first *Gingles* factor was satisfied. Pet. App. A162. That finding was subsequently accepted in the en banc proceeding by both Judge Kravitch (*id.* at A20) and Chief Judge Tjoflat (*id.* at A108).

With respect to the second *Gingles* factor (see Pet. 33-36), the district court rejected respondents' evidence of racial bloc voting on the ground that it was "satistically significant" (Pet. App. A224), but not "legally significant." *Id.* at A225. The panel found that respondents' uncontroverted statistics regarding 16 elections showed that, with only one arguable exception, the levels of black cohesiveness fell within the range found to be legally significant in *Gingles*. See Pet. App. A167-A168. Once again, that finding was accepted by both Judge Kravitch (*id.* at A22-A24 & A35-A38 nn.9-10) and Chief Judge Tjoflat (*id.* at A108), and was fully in accord with *Gingles*.

Finally, petitioners are incorrect in claiming (Pet. 36-38) that respondents did not present the evidence necessary to assess whether white bloc voting usually led to the defeat of minority-preferred candidates. Respondents presented figures for white bloc voting in six county-wide elections involving black candidates. At the levels of white bloc voting observed, the coalition of black and crossover white voters would *always* suffer defeat in countywide elections (Pet. App. A25 & A39 nn.13-14, A180-181). This showing suffices to satisfy *Gingles*' definition of legally significant white bloc voting. 478 U.S. at 56. Indeed, this Court noted in *Gingles* that, "where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim." *Id.* at 57 n.25. Petitioners' argument that respondents' evidence was insufficient is therefore mistaken and, in any event, does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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